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ABSTRACT

Intended for persons concerned about public policies for exceptional children and those engaged in creating public policy, the book provides guidelines and examples of appropriate policies for exceptional children. Considered in Section I are the varying rights that advocacy groups have won for exceptional children in the legislatures, courts, and administrative agencies, including the rights to education, due process, least restrictive alternative, nondiscriminatory testing, and confidentiality. Current developments in public policy at the federal, state, and local levels are examined in Section II with texts or digests of significant federal laws provided. Trends in state law are reviewed, a model state law is provided, and the issue of financing special education is analyzed. Discussed in Section III are the varying avenues of change: statutory law, administrative policy, attorney generals' opinions, and litigation. Section IV provides information on advocate needs to effect change including techniques of political action, the problem of priority setting, and the impact of time and circumstances on policy decisions. Professional rights and responsibilities are discussed in the final section including such questions as whether a professional is solely an employee of a system or whether he is also an advocate for children, and the positive and negative impact of collective bargaining on exceptional children. (DB)

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Public Policy and the Education of Exceptional Children

Edited by

Frederick J. Weintraub
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Introduction

□ In designing this book, the editors had as their goal publishing the definitive document on public policy as it relates to exceptional children. It does not take a great scholar on this subject to realize that the goal has not been achieved. Nor will it ever be achieved, for several important reasons. First, public policy affects every aspect of human endeavor relating to exceptional children. To conceptualize the totality of special education, or to chronicle its policy and decison making base is beyond any individual's or group's capacity. Second, there are over 16,000 school districts, 50 state governments, one federal government, numerous other governing authorities and subunits of government all creating and carrying out policies concerning or affecting exceptional children, without necessarily any consistency. No one can identify all these policy making units, let alone what each is doing. Third, policy is a living phenomena. During the period this book was being written, most federal, state, and local policies affecting exceptional children changed to some degree. For example, S.6, The Education for All Handicapped Children Act, became Public Law 94-142, substantially altering the federal role in educating handicapped children. The first federal regulations on the gifted and talented were promulgated. Similar changes occurred at the state and local level. We have tried to report such changes, but tomorrow is still unknown. Finally, we ran out of time and pages.

The book does, however, for the first time, provide a complete resource package for individuals who are concerned about public policies for exceptional children, and for those who want a better understanding of such policies and the know-how to effect necessary changes. It is also a resource for those who already are engaged in creating public policy, in that it provides guidelines for appropriate policies for exceptional children.

As a resource package, the book is divided into five sections, so that the reader can either read the entire book or only those sections of particular interest. Each section has an overview which provides a summary of the section and a guide for reading. The sections are then divided into chapters on the specific issues raised in each section.

Section I examines the varying rights that advocacy groups have won for exceptional children in the legislatures, courts, and administrative agencies of our land. The section explains right to education, due process, least restrictive alternative, nondiscriminatory testing, confidentiality, and other rights concepts that have in the last five years impacted significantly on education of exceptional children.

Section II explores what is happening in public policy at the federal, state, and local levels. Significant federal laws are either provided or digested. Trends in state law and other policies are reviewed, a model state law is provided, and the critical issue of financing special education is exhaustively examined.

Section III discusses the varying avenues of change: statutory law, administrative policy, attorney generals' opinions, and litigation. The section is a primer on understanding how each of the avenues functions and what an advocate must know about each to effect policy change for exceptional children.

Section IV provides the understanding and techniques an advocate needs to effect change in any system. There are some who may find the realities presented here harsh, but the varied public forums for change are not for the timid. The authors therefore sought not to paint an image of an Elysium field. The section examines techniques of political action, the problem of priority setting, and the broad impact that time and circumstances have upon policy decisions. It also provides several case examples where groups fought the battle and won. Hopefully the reader will share their adventures, tribulations, and joys.

Section V tackles an issue of growing importance, but one that has until now, received little attention—professional rights and responsibilities. There is an ever emerging body of knowledge about the rights of children, but there is a dearth of knowledge about the individual responsibilities and liabilities of professionals in relation to the children they serve. The question of whether a professional is solely an employee of a system or whether he is also an advocate for children is examined through professional literature and litigation. The positive and negative impact on exceptional children of collective bargaining is also explored. The section will not provide all the answers a professional may need, but it will be of great assistance to the many professionals who find themselves in conflict situations.

Authors make editors look good. The 20 authors of this book contributed because of commitment, not remuneration. They responded to impossible deadlines and stood by us in the final throes of putting the book together. We appreciate their efforts and support.

Unless one has gone through the agonies of publishing a book, it is difficult to appreciate the many people who actually do the hard work to make the final product meaningful. We appreciate the following staff at The Council for Exceptional Children who worked, often on their own time, to make this book possible: Janet Luersen, Ellen Wells, Nancy Green, Gale Adams, Dee Barrie, Mary Wolfe, Laura Haffer, and Janet Goldstein.

Finally, we dedicate this book to the hundreds of thousands of individuals who have devoted their energies over the years to improving public policies for exceptional children, and to those who will do so in the future. And most of all, to the millions of exceptional children, so that their tomorrows may be brighter than today.

Frederick J. Weintraub

Public Policy and the Education of Exceptional Children

Section I:

The Educational Rights of Exceptional Children

Section Editor

Alan Abeson

Overview

◻ To the handicapped and to those who labor on their behalf, the first half of the current decade has come to be known as the era in which the battle cry for public policy advances changed from charitable solicitations to declarations of rights. The public arena in which this cry was raised was chiefly in the nation's courts but it likewise included extensive legislative activity, focusing on broad areas of American life heretofore inaccessible to handicapped citizens.

While it is the purpose of this section to emphasize the major educational "rights" won by exceptional children, it must be recognized that education is but one area in which a civil rights revolution for the handicapped is taking place. Among the others are the right of institutionalized handicapped persons to be free from unusual and cruel treatment; the right of institutionalized handicapped persons to be freed from employment without reimbursement and without rehabilitative purpose; the right to avoid involuntary institutionalization on the part of persons who represent neither a danger to society nor to themselves; the right of the handicapped to exercise the power to vote; the right of the handicapped both to marry and to procreate; the right of the handicapped to travel on the nation's public conveyances; and the right of the handicapped to access to America's buildings by means of removal of environmental barriers.

The chapters which constitute this section specifically examine the major rights that have been established in courts and legislatures regarding the education of exceptional children. In addition to focusing on a distinct area, each chapter as well describes, to some extent, society's past failure to provide the handicapped with their rights; it then traces the movement until the present day, wherein implications for the education of exceptional children are explored.

In the first of these chapters, Weintraub and Abeson outline the total relationship between public policy and society's treatment of the handicapped in terms of majority versus minority control. In addition, the author relates these principles to the education of the handicapped in light of today's litigative and legislative mandates.

Gilhool's chapter contains a complete description of the landmark 1971 *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* lawsuit wherein the right to an education for all school age mentally retarded citizens was first established. Attorney Gilhool appropriately points out that the basis of the argument presented to the Pennsylvania court was borrowed from another civil rights effort related to the education of Black youngsters: the historic 1954 *Brown v. Board of Education* integration case. Their common logic has become, as he illustrates, an essential component of the doctrinal foundation upon which the entire right to education movement is based.

The third chapter focuses on due process of law as it relates to identification, evaluation, and educational placement decisions for handicapped children. This chapter by Abeson, Bolick, and Hass, is the first chapter in *A Primer on Due Process*, a book which makes various recommendations to public schools attempting to implement due process. Emphases in this chapter are given to both judicial and statutory mandates for the implementation of due process procedures, to the relationship of the process to many traditional special education problems, and to the positive potential of the process for American education. Nazzaro's chapter carefully considers various aspects of the legal and educational controversy surrounding the evaluative procedures and instruments used as a basis for placement of children in special education programs. The author then describes the elements of a well reasoned and ordered set of policies which successfully builds on directives established by the US Office of Education's Bureau of Education for the Handicapped.

A chapter by Abeson examines federal law concerning the inappropriate use of information and records collected and maintained by the public schools; in recent years, such abuse has been the subject of legislation and litigation. The chapter also specifically examines the Buckley Amendment (1974) which provides parents of minor children and all students over 18 or attending post secondary schools with the right to see, correct, and control access to student records.

Johnson's chapter in this section focuses on the combination of all the educational and procedural directives now in force in order to place handicapped children effectively and properly in appropriate programs. His presentation is based on the experiences of the Minneapolis public schools as they adopted required new policies and procedures.

The final chapter in this section contains excerpts from four right to education lawsuits now concluded. These materials are presented as a resource for persons specifically interested in the legal language of the court over the recent past, as the civil rights of handicapped children have become recognized. The cases presented include:

Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, (334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972))

Mills v. Board of Education of District of Columbia, (348 F. Supp. 866 (D.D.C. 1972))

Maryland Association for Retarded Children v. State of Maryland, (Equity No. 100-182-77676 (Circuit Ct., Baltimore City, Md., filed May 3, 1974))

North Dakota Association for Retarded Children v. Peterson, (Civil Action No. 1196 (D.N.D., filed Nov. 28, 1972)

(Readers should note that the Pennsylvania and Mills cases were undertaken in federal court while the others were brought at the state level.)

FREDERICK J. WEINTRAUB
ALAN ABESON

New Education Policies for the Handicapped: The Quiet Revolution

□ A quiet revolution (Dimond, 1973) has been fought within American education during the past few years. Its goal is the right to an education for *all* American children, and particularly those usually known as "the handicapped," those who, because of mental, physical, emotional, or learning problems, require special education services. Their number is estimated to be seven million, one million of whom receive no educational services at all (Weintraub, Abeson, & Braddock, 1971). Further, only 40% of these children, all of whom will be in need of special education services at some time during their education careers, are receiving the services they need.

This revolution to establish for the handicapped the same right to an education that already exists for the nonhandicapped has been occurring throughout the nation, in state and local school board rooms, state legislative chambers, and, perhaps most importantly, in the nation's courts. While the most significant measure of the impact of this movement is the number of children who will no longer be denied an education, it is clear that other basic public policy matters will be reshaped.

Public policy determines the degree to which minorities, in this case the handicapped, will be treated inequitably by the controlling majority. It is almost axiomatic that those with power to distribute resources and benefits will not allocate those resources and benefits equitably to all who may have interests. Thus minorities and civil rights proponents seek from the controlling majority equal treatment for the minority.

There is no doubt that the handicapped have been and continue to be treated as a powerless minority.

> With minor exceptions, mankind's attitudes toward its handicapped population can be characterized by overwhelming prejudice. [The handicapped are systematically isolated from] the mainstream of society. From ancient to modern times, the physically, mentally, or emotionally disabled have been alternatively viewed by the majority as dangers to be destroyed, as nuisances to be driven out, or as burdens to be confined . . . . [T]reatment resulting from a tradition of isolation has been invariably unequal and has operated to prejudice the interests of the handicapped as a minority group. (*Lori Case v. State of California*, 1973, p. 1a).

Although many people still believe that America's public schools are the great equalizer for America's diversity, this has not been true for handicapped children; for the most part they have been blocked from entering the schoolhouse door. The strategies used by school officials have included postponement, exclusion, suspension, and outright denial. Such incidents continue to occur, although most state constitutions require the state to provide all children with an education.

The legal basis for these practices is frequently the state compulsory attendance laws, which for some handicapped children become compulsory nonattendance laws. Typically, they provide for the exclusion of "children with bodily or mental conditions rendering attendance inadvisable," as in Alaska (Alaska Statutes, 1971). In Nevada exclusion may occur when "the child's physical or mental con-

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dition or attitude is such as to prevent or render inadvisable his attendance at school or his application to study" (Nevada Revised Statutes, 1963).

EQUAL PROTECTION

The legality of denying a public education to handicapped children by exclusion, postponement, or any other means is increasingly being challenged. The basis for this challenge comes from the equal protection clause of the 14th Amendment to the U.S. Constitution, which guarantees to all the people equal protection of the laws. Basically, this means that what is done to some people must be done to all persons on equal terms. Thus a state may not set up separate systems and procedures for dealing with different groups of people unless a compelling cause for such differential treatment can be demonstrated. During the 1950's and the early 1960's, the use of the equal protection concept by the Warren Court as a rationale for achieving social justice resulted in the 14th Amendment being ingrained into the basic fabric of American justice.

The application of the equal protection concept to the education of handicapped children will force public education to reexamine the term *equal educational opportunity*. Initially, equal educational opportunity was a populist concept. Tom Watson translated it thus: "Close no entrance to the poorest, the weakest, the humblest. Say to ambition everywhere, the field is clear, the contest fair; come, and win your share if you can!" (Woodard & Watson, 1963). Education became a race or a free-for-all where everyone had equal access to its resources and equal opportunity to meet or fail its objectives.

In the 1960's American education moved into the compensatory period. To paraphrase James Coleman (1968), we said to those in the race who could not run, "We'll give you crutches, we'll give you remedial reading, we'll help you run the race." Thus the concept was changed to require equal access to differing resources for equal objectives, with everybody still coming out the same in the end.

Today the meaning of equal educational opportunity has changed once again. Now, principally because of federal court activities already concluded in Pennsylvania, the District of Columbia, and Louisiana, and pending in over 35 suits throughout the country, the new meaning is "equal access to differing resources for differing objectives" (Weintraub & Abeson, 1972).

THE PARC CASE

The right to education movement, as this revolution to redefine equal educational opportunity is called, is less than three years of age. A beachhead was achieved in the summer and fall of 1971 when the state of Pennsylvania entered into a court approved consent agreement with the plaintiff, the Pennsylvania Association for Retarded Children (PARC) and 13 mentally retarded children of school age who were representing themselves and the class of all other retarded children of school age in the state. The suit had been brought in January 1971 against the Commonwealth of Pennsylvania for the state's failure to provide access to a free public education for all retarded children. The defendants included the state secretaries of education and public welfare, the state board of education, and 13 named school districts, representing the class of all of Pennsylvania's school districts (*PARC v. Commonwealth*, 1971).

The suit, heard by a three judge panel in the Eastern Pennsylvania U.S. District Court, specifically questioned public policy as expressed in law, and policies and practices which excluded, postponed, or denied free access to public education opportunities to school age mentally retarded children who could benefit from such education.

Expert witnesses testified, focusing on the following major points:

1. The provision of systematic education programs to mentally retarded children will produce learning.
2. Education cannot be defined solely as the provision of academic experiences to children. Rather, education must be seen as a continuous process by which individuals learn to cope and function within their environment. Thus, for children to learn to clothe and feed themselves is a legitimate outcome achievable through an educational program.
3. The earlier these children are provided with educational experiences, the greater the amount of learning that can be predicted.

The order provided that the state could not apply any law which would postpone, terminate, or deny mentally retarded children access to a publicly supported education, including a public school program, tuition or tuition maintenance, and homebound instruction. By October 1971 the plaintiff children were to have been reevaluated and placed in programs, and by September 1972 all retarded children between the ages of 6 and 21 were to be provided a publicly supported education.

Local districts providing preschool education to any children were required to provide the same for mentally retarded children. The decree also stated that it was highly desirable to educate these children in a program most like that provided to nonhandicapped children. Further requirements included the assignment of supervision of educational programs in state schools and institutions to the state department of education, the automatic reevaluation of all children placed on homebound instruction every three months, and a schedule that would lead to the placement of all retarded children in programs by September 1, 1972. Finally, two masters were appointed by the court to oversee the plans to meet the requirements of the order and agreement.

MILLS V. BOARD OF EDUCATION

Those who described the outcome of the *Pennsylvania Association for Retarded Children* case as being "one of those things" or said "let's wait and see what happens" were later that year provided with a more impressive federal ruling. In *Mills* v. *Board of Education* (1972), the parents and guardians of seven District of Columbia children brought a class action suit against the D.C. Board of Education, the Department of Human Resources, and the mayor for failure to provide all children with a publicly supported education.

The plaintiff children ranged in age from 7 to 16 and were alleged by the public schools to present the following types of problems leading to the denial of their opportunity for an education: slight brain damage, hyperactive behavior, epilepsy and mental retardation, and mental retardation with an orthopedic handicap. Three children resided in public residential institutions with no education program. The others lived with their families, and when denied entrance to programs were placed on a waiting list for tuition grants to obtain a private education program. However, in none of these cases were tuition grants provided.

The history of events involving the city and the attorneys for the plaintiffs immediately prior to the filing of the suit demonstrated the Board of Education's legal and moral responsibility to educate all excluded children; although provided with numerous opportunities to provide services to plaintiff children, the board failed to do so.

On December 20, 1971, the court issued a stipulated agreement and order that provided for the following:

1. The named plaintiffs must be provided with a publicly supported education by January 3, 1972.
2. By the same date, the defendants had to provide a list showing every child of school age not receiving a publicly supported education.
3. Also by January 3, the defendants were to initiate efforts to identify all other members of the class not previously known.
4. The plaintiffs and defendants were to consider the selection of a master to deal with special questions arising out of this order.

The defendants failed to comply with the order, resulting in plaintiffs filing, on January 21, 1972, a motion for summary judgment and a proposed order and decree for implementation of the proposed judgment.

On August 1, 1972, U.S. District Judge Joseph Waddy issued such an order and decree providing:

1. A declaration of the constitutional right of all children, regardless of any exceptional condition or handicap, to a publicly supported education.
2. A declaration that the defendant's rules, policies, and practices which excluded children without a provision for adequate and immediate alternative educational services and the absence of prior hearing and review of placement procedures denied the plaintiffs and the class rights of due process and equal protection of the law.

The defendants claimed in response that it would be impossible for them to afford the relief sought unless the Congress appropriated more funds or funds were diverted from other educational services for which they had been appropriated. The court responded:

> The District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia public school system, whether occasioned by insufficient funding

> or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

RESHAPING PUBLIC POLICY

The decisions in *PARC* and *Mills,* although of landmark importance, represent only the tip of the iceberg in the effort to assure through public policy the equal treatment of handicapped children by the majority interests of education. In addition to the equal protection efforts of the courts, attorneys general in New Mexico (1971), Arkansas (1973), and elsewhere; legislatures in Tennessee (1972), Massachusetts (1972), Wisconsin (1973), and elsewhere; and at least one commissioner of education, Ewald B. Nyquist of New York (*Reid v. Board of Education of the City of New York,* 1973), have ordered public policy alteration regarding the public education of handicapped children.

A second important aspect of public policy is that it determines the degree to which those who are served will be vulnerable to abuse from those who provide the services. Whenever an individual—any individual, handicapped or not—is dependent for his basic rights, for his very existence, upon those who serve him, then he is no longer free, because his whole future is dependent upon maintaining the good graces of those who serve him. As Burton Blatt (1973) has said,

> How can people be free when others have control over the destiny of their lives? . . . One of the objectives of this revolution must be to reach the day when handicapped individuals are free and have the ability to determine their own destinies.

Recent litigative activities again have served to reshape this aspect of public policy. Following the filing of the *PARC* suit, one of the initial questions asked of local school administrators by the court concerned the manner in which they made decisions to exclude the plaintiff children from an education. The response was that such decisions were often made on the basis of hearsay information compiled casually, often without school officials ever seeing the child. The court responded incredulously and quickly established the right of all children to the protection of procedural due process (in accordance with the 5th and 14th Amendments) whenever changes in their educational status were proposed.

In the *PARC* consent order, the definition of "change in educational status" is "assignment or reassignment, based on the fact that the child is mentally retarded or thought to be mentally retarded, to one of the following educational assignments: regular education, special education, or to no assignment, or from one type of special education to another." The order further lists 23 specific steps required to meet the due process requirements.

Some of those requirements include:

1. Providing written notice to parents or guardians of the proposed action.
2. Provision in that notice of the specific reasons for the proposed action and the legal authority upon which such actions can occur.
3. Provision of information about alternative education opportunities.
4. Provision of information about the parent's or guardian's right to contest the proposed action at a full hearing before the state secretary of education or his designate.
5. Provision of information about the purpose and procedures of the hearing, including parent's or guardian's right to counsel, cross examination, presentation of independent evidence, and a written transcript of the hearing.
6. Provision for the scheduling of the hearing.
7. Indication that the burden of proof regarding the placement recommendation lies with the school district.
8. Right to obtain an independent evaluation of the child, at public expense if necessary.

These procedures, or ones like them, are frequently associated with the right to education revolution. For example, they have been spelled out by the courts in *Mills* (1972) and in *Lebanks* v. *Spears* (1973) in Louisiana; by the legislature in Massachusetts and Tennessee; and by the state department of education in Colorado (*Rules for the Administration of the Handicapped Children's Act,* 1973). In addition, a bill pending in the U.S. Congress (1973a) contains similar provisions.

Some public educators have responded to these clear mandates as a violation of their professional prerogative. Clearly, however, the new public policy recognizes the inappropriate manner in which educators have often made relevant decisions. The new policy reflects the belief that the type of education to be provided to a child is just as significant a decision as whether a person is innocent or guilty of a crime, because both decisions will influence the individual's entire future. The decision to place or not place a child in a program for the mentally retarded is not only a decision about what happens to him today, but his whole future; and thus the child and his family must have recourse to challenge the appropriateness of the school's recommendations.

In all instances the courts have not only ruled that handicapped children are entitled to a free public education, but are also entitled to an education appropriate to their needs. It is possible to see educational placement of children as a continuum. At one end are those placements that are totally normal—e.g., a regular classroom. At the other end are those that are highly abnormal—e.g., an institution. The courts are requiring schools to follow policies of least restrictive placements. This requires that the settings in which educational programs are provided to handicapped children be as close to normal as possible. The order in *Lebanks* v. *Spears* (1973) specified that "all evaluations and educational plans, hearings, and determinations of appropriate programs of education and training . . . shall be made in the context of a presumption that among alternative programs and plans, placement in a regular public school class with the appropriate support services is preferable to placement in special public school classes" and so on. Always, the concern is to maintain the child in that setting which is most normal and in which he can learn most effectively.

LABELING AND LITIGATION

Much has been written about the "labeling" dilemma in American education. Labels are often used to justify isolation and discrimination against children. Appropriateness and its due process procedures will not eliminate labels, but they do require that when applied, labels must be accurate. Due process will contribute substantially to prevention of incorrect labeling, which is often followed by inappropriate educational placement.

Labeling has also been the subject of litigation. In Janaury 1970 a suit was filed in the District Court of Northern California on behalf of nine Mexican American students, ages 8 to 13 (*Diana v. State Board of Education*, 1970, 1973). The children came from homes in which Spanish was the major language spoken. All were in classes for the mentally retarded in Monterey County, California. Their IQs ranged from 30 to 72, with a mean score of 63.5. When they were retested in Spanish, seven of the nine scored higher than the IQ cutoff for mental retardation, and the lowest score was three points below the cutoff line. The average gain was 15 points.

The plaintiffs charged that the testing procedures used for placement were prejudicial, because the tests placed heavy emphasis on verbal skills requiring facility with the English language, the questions were culturally biased, and the tests were standardized on white, native born Americans. The plaintiffs further pointed out that in "Monterey County, Spanish surnamed students constitute about 18.5% of the student population, but nearly one-third of the children in educable mentally retarded classes."

Studies by the California State Department of Education corroborated the inequity. In 1966–1967, of 85,000 children in classes for the educable mentally retarded in California, children with Spanish surnames comprised 26% while they accounted for only 13% of the total school population.

The plaintiffs sought a class action on behalf of all bilingual Mexican American children then in classes for the educable mentally retarded and all such children in danger of inappropriate placement in such classes. On February 5, 1970, a stipulated agreement order was signed by both parties. The order required that:

1. Children are to be tested in their primary language. Interpreters may be used when a bilingual examiner is not available.
2. Mexican American and Chinese children in classes for the educable mentally retarded are to be retested and evaluated.
3. Special efforts are to be extended to aid misplaced children readjust to regular classrooms.
4. The state will undertake immediate efforts to develop and standardize an appropriate IQ test.

Another important case in this area was *Larry P.* v. *Riles* (1972), filed as a class action in late 1971 on behalf of six Black, elementary school aged children attending class in the San Francisco Unified School District. It was alleged that they had been inappropriately classified as educable mentally retarded and placed and retained in classes for such children. The complaint argued that the children were not mentally retarded, but rather the victims of a testing procedure which failed to recognize their unfamiliarity with white middle class culture. The tests ignored the learning experiences the children may have had in their homes, the complaint said. The defendants included state and local school officials and board members.

It was alleged that misplacement in classes for the mentally retarded carried a stigma and "a life sentence of illiteracy." Statistical information indicated that in the San Francisco Unified School District, as well as the state, a disproportionate number of Black children were enrolled in programs for the retarded. It was further pointed out that even though code and regulatory procedures regarding identification, classification, and placement of the mentally retarded were changed to be more effective, inadequacies in the processes still existed.

On June 20, 1972, the court enjoined the San Francisco Unified School District from placing Black students in classes for the educable mentally retarded on the basis of IQ tests as currently administered, if the consequence of using such tests is racial imbalance in the composition of classes for the educable mentally retarded.

RAMIFICATIONS

The public policy shift represented by judicial decrees and new legislation calling for the provision of appropriate education in the least restrictive alternative educational placement as determined through due process has set the stage for another aspect of the quiet revolution. That aspect is: Appropriate education requires individual program planning for each child.

The individual plan would be one jointly determined and agreed to (in writing) by the child, his parents, and the public schools. The agreement would cite the objectives to be achieved with the child, the resources (dollars, personnel, materials, space, time) to be allocated, a schedule for attainment of the objectives, and a plan for evaluating attainment. The agreement might also specify parental and child obligations. Additionally, the agreement might bind third parties who contribute to the child's learning; for example, a local agency that provides physical therapy. If the objectives are met, then a new plan is created; if not, then the plan is renegotiated to employ new strategies. This should keep children from remaining in inappropriate programs.

Public policy largely determines how society will perceive a class or group of individuals. Thus the nation's policies regarding handicapped children by and large have cumulatively produced the negative image of these children. Society's negative view of the handicapped is developed when such children are excluded from the schools of all other children, confined to distant out of sight human warehouses, and refused access to airplanes, driver's licenses, and employment, strictly on the basis of their handicap.

U.S. Senator Harrison A. Williams of New Jersey (U.S. Congress, 1973b) recently discussed his own feeling of discomfort when associating with handicapped people. When conducting hearings on the education of the handicapped, he realized that during his education he did not attend school with handicapped children. Senator Williams wondered how, then, as adults we can behave positively toward the handicapped. How can persons be asked to employ the handicapped and live with the handicapped when they grow up in an education system where they have no contact with handicapped people, where they are told the handicapped are different and that they should be segregated? If we truly wish to be a society that respects differences, then the place to start is in our schools. It is senseless to teach respect for individual differences in an educational environment laced with policies to the contrary.

Finally, public policy influences how a class or group of individuals will feel about themselves. Imagine the self perception of a child who is repeatedly told he is different, unusual, and doesn't belong, hence is prevented from living like his peers by formidable public policies and procedures. While the psychologists in California who tested Spanish speaking children in English probably did not perceive themselves as part of a conspiracy against Mexican American children, their actions could have conveyed that image to the children, their families, and their communities.

The child who is suspended from school for what may be a good reason, but without being provided due process, may learn that this is a society not of law but one of arbitrary and capricious tyrants. The child in a wheelchair who must attend a special school for no other reason than the fact that a flight of stairs bars entry to the neighborhood school is learning that this is, in fact, a very hostile society.

Yes, a quiet revolution is occurring. At the minimum, it will make educational opportunity a reality for all handicapped children. At the maximum, it will make our schools healthier learning environments for all our children. Thus far the revolutionaries have been the courts, the legislators, the school boards. Now it is time for us educators to make it our revolution.

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THOMAS K. GILHOOL

Education: An Inalienable Right

☐ Litigation is busting out all over. In increasing numbers handicapped citizens—citizens who are different and citizens who are thought to be different—are turning to the courts to secure their rights, to secure to themselves that which is due them.

GROWING LITIGATION

In San Francisco an 18 year old high school graduate who is dyslexic and who after graduation is only able to read at the fifth grade level has gone to court for damages against the school system for failure to teach. In San Francisco, a number of citizens, some of them handicapped and some of them family, friends, and associates of the handicapped, have gone to court to strike down a zoning ordinance which would exclude from certain neighborhoods small group residences for handicapped citizens. In Washington, D.C., handicapped citizens have gone to court to insure that the subway system that is being built there will accommodate physically handicapped citizens.

Right to Treatment

Among the cases now in litigation and in significant number decided, three lines may be discussed. The first line of cases has come to be called the right to treatment cases. These cases, in contemporary terms, began in Alabama when Judge Johnson of the northern district of Alabama in the case of *Wyatt v. Stickney* was called upon to look at certain state institutions for the mentally ill and for the mentally retarded.

Judge Johnson in that case ruled that citizens residing at state schools and hospitals indeed have certain rights. They have the right to a humane physical and psychological environment. They have the right to treatment or, if you will, habilitation, or, if you will, program. They have the right to an individual program fitted to their capabilities, a program which is designed individually and reviewed often and a program which, of course, includes education. They have a panoply of other rights such as the right to privacy, the right to use the telephone and to receive and send letters, and finally the right to receive their programs in the least restrictive setting, that is, in the community or perhaps in the public school rather than in a remote and isolated institution. Right to treatment cases similar to this Alabama case are pending now in Massachusetts, New York, Nebraska, Minnesota, and Wisconsin.

Question of Standards

The second line of cases began in California against the backdrop of the following facts: While 9% of the school population in California is Black, 27% of the children enrolled in educable retarded classes are Black; while 13% of the school population in California is Chicano, 26% of the educable class population is Chicano; and while in New Mexico, for example, 7,000 of the school population enrolled in special education are girls, 11,000 (4,000 more) are boys. Those figures, of course, do not merely characterize California or New Mexico. That discrimination, that overbalance, can be found in each one of our states. In a line of cases that began with the case of *Diana v. State Board of Education* (1970) and was followed by the case of *Larry*

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P. v. Riles, 343 F. Supp. (1972) and recently by the case of *Ruiz v. State Board of Education* (1971), the courts have addressed the question of the standards applied to assign children to special education. Those cases have resulted in such things as an injunction against group testing, the requirement that tests be standardized—indeed be developed and standardized for cultural and language subgroups in our society—and the requirement that no one be assigned to a special program without the consent of the parent.

Right to Education

This second line of cases bears directly upon the third, to which I especially want to attend. They are the cases that have come to be called the right to education cases, and they are concerned with the access to free public education for all exceptional children. They seek and have secured zero reject education. This third line of cases is concerned as well with the role of parents and children themselves in the design of their education. They are concerned with, as we have come to call it, securing the right to a due process hearing.

The third line of cases began in Pennsylvania with the case of the *Pennsylvania Association for Retarded Children v. the Commonwealth of Pennsylvania*. It was a historical accident, of course, that in the beginning the class of children suing was the retarded. In subsequent cases, of which there are now a great number, the class of children suing to secure their rights include all exceptional children. The Pennsylvania case and the decision therein was followed shortly by a decision in the District of Columbia. That was followed by litigation against the New Orleans Parish School District and the State of Louisiana. In turn, that case has been followed by four or five cases in the state of North Carolina and by cases in Maryland, Kentucky, Rhode Island, Maine, Delaware, New York, Massachusetts, North Dakota, Colorado, Nevada, and Wisconsin. Within the next several weeks the states of Hawaii, Arizona, New Mexico, and California will be in court on the right to education.

TURNING TO THE COURTS

In a sense, resort to the courts by those in the movement of which we are members is new, but it should not be strange. There are, I suspect, too many who think that the resort to litigation is an act of hostility, just short of a declaration of war. That, of course, is not the case. The use of the courts to secure one's rights is not really different from the things we have been doing for many decades. It is not different from resorting to the legislature by lobbying or from resorting to the executive by way of negotiations with statewide or local school officials. To be sure, the language may be a bit different and that is what lawyers are for—to translate the claims of children, parents, and others into language that the courts can address. But then, the language with which one speaks to the legislature is slightly different from the language with which one speaks to administrators. It is essentially the same, however; we are after our rights.

The courts also have slightly different powers than do the legislature and the executive. For example, it is the art of accommodation that characterizes decisions in the legislature and in the executive. In the courts it is not a question of accommodation; it is the art of the necessary. If the Constitution requires it, if the statutes require it, it shall be done; there is no question of accommodating. Perhaps most significantly, it is important to understand what has now been made most clear by the United States Supreme Court, which in the case of *Shapiro v. Thompson* held unconstitutional the one year residence requirement for public assistance. The point is that the absence of money is no defense for the failure to deliver rights as required by the Constitution and by the laws. The state cannot grant services to some and withhold them from others merely because it would cost more to give services to all. So, there are some special advantages in turning to the courts.

Many persons concerned about the hostility of which I spoke have eschewed the courts for a good period of time. They have been concerned in the school context, for example, with the difficulties presented by suing those administrators and teachers upon whom they depend for services, a fear appropriate to the situation. The experience in the Pennsylvania case and other cases indicates that that fear too is misplaced. I need not remind you of what The Council for Exceptional Children proclaimed in a draft policy statement on the organization and administration of special education (CEC Policies Commission, 1971). CEC—you—said that there is no dividing line which excludes some children and includes others in educational programs. Mentally retarded children of yesteryear who were excluded because they were "unteachable" are now recognized to be teachable. The point is that lawyers and parents turning to the courts are doing nothing special or unusual. Essentially, what they have done is to adopt the agenda long since set by the best of the professionals and shared by the parents' movement, and they have taken that agenda to court. And so, the experience in the litigation has been that those named as defendants, if they are good professionals, welcome litigation as an opportunity to advance the agenda which they share.

AN OLD TRADITION

In going to the courts, exceptional citizens have joined an old tradition in the United States. That tradition, the use of the courts to achieve social change, to achieve justice, dates back at least to 1905 when W. E. B. Dubois and his associates founded the National Association for the Advancement of Colored People (NAACP). From the very beginning they articulated among their strategies the use of the courts to achieve the rights that they were claiming. In pursuit of that strategy, for over 50 long years the NAACP turned again and again to the courts. That effort culminated in the decision of the US Supreme Court in 1954 in *Brown v. Board of Education* which held unconstitutional segregated schooling.

You are familiar, of course, with the use of the courts in the late 1950's and in the early 1960's by the civil rights movement. In the early 1960's, as lawyers became available in some significant number to low income citizens, the poor, welfare recipients, public housing tenants, and low income consumers resorted to the courts. As the 1960's wore on, the courts were used by the women's movement, a use not unlike that by the labor movement some 30 years before. More recently, the elderly have turned to the courts to assert their rights.

That is the tradition into which 13 retarded children in January of 1971 stepped and placed all of us. It is a tradition that is bound not merely by historical accident but rather by a certain common experience shared by each of the groups. It is the experience of being on the wrong end of the judgment made so widely in our society that *we* are superior and *they*—the poor, the women, the aged, the handicapped—are inferior.

That judgment has had, of course, enormous consequences. It means that they are not persons. It means that they need not be heard. It means that they need not be listened to. It means that we need not act on what they say to us (which has, of course, characterized official behavior toward each of those groups for a considerable period of time). It means that attached to them is a certain stigma, and following on the stigma is prejudice, discrimination, finally the tendency to separate them out—to institutionalize them.

There are other consequences as well. When that judgment is being fed back to those of us who are on the wrong end of it, again and again and again by people and by institutions, we come to believe it; we come to believe, as the retarded and their families have come to believe, that indeed we are inferior. We tend then to feel ashamed, to feel guilty, and to be most timid in the face of authority, to be timid too often in asserting our rights.

This tradition, which in some sense has characterized the experience of each of those groups in contemporary society, is a tradition which has a jurisprudence, a set of facts of which the courts have taken account. For example, in perhaps the clearest and most famous statement of the duty of the court to such citizens, Chief Justice Stone, in the famous footnote 4 of the US Supreme Court's decision in *United States v. Carolene Products*, 304 U.S. 144, 152 (1938), set out the jurisprudence to which we are now addressing ourselves. Chief Justice Stone said that "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the political processes ordinarily to be relied upon and which therefore may call for a correspondingly more searching judicial inquiry."

USES OF LITIGATION

Against that background, I want to ask you to walk with me through the Pennsylvania experience, although we could, of course, be looking with equal care at any one of the cases which I have mentioned. As we look at the Pennsylvania experience, let me ask you to bear in mind at least four uses to which litigation may be put. First, citizens may use litigation in order to secure certain substantive rights, in this case, zero reject education, access to free public education by all. Second, litigation may be used to create a new place, a new forum, where citizens may turn to enforce their rights and perhaps create new rights. In any case, they can make real in their particular experience the rights that have been declared otherwise. Third, the courts may be used to bring to the attention of the public—the public-at-large, legislators, decision makers, the ordinary citizen—certain facts that have not had great visibility before. In the right to education cases, for example, the essential fact that all children are capable of benefiting from an education would be brought out. Fourth, the courts may be used by a citizen, as indeed may any other means of petitioning the government for redress of grievances, to express himself, to act out, to tell others who and what he is, or, in another sense, to redefine, change, or alter his notion of himself.

SECURING ACCESS TO EDUCATION

In the Pennsylvania case, those four uses of litigation can be seen in the course of that litigation. First, those 13 children, on January 7, 1971, went to Federal district court with the Pennsylvania Association for Retarded Children, and they went on behalf of every excluded child in the Commonwealth of Pennsylvania. They took with them to court the Commonwealth of Pennsylvania, the Secretary of Education, the Secretary of Public Welfare, 13 individual school districts, and all of the school districts of the Commonwealth of Pennsylvania. They went, in the first instance, to secure access to free public schooling. Why did they go? Well, despite the declaration in Pennsylvania law that Pennsylvania shall provide a proper education for all of its exceptional children and despite the considerable efforts of those who manned that system (people like Bill Ohrtman and Joe Lantzer, who for many years labored with others to make that declaration real), what the law gave on the one hand, it took away on the other. And what it did not take away in the words of the law, practice managed to take away. While Pennsylvania statutes said the Commonwealth shall provide a proper education for all of its exceptional children, a few paragraphs later the law said that children who are uneducable and untrainable may be excluded from the public schools and that children who have not yet attained a mental age of 5 years may be postponed in admission to the public schools. Consider that a mental age of 5 can mean an IQ of 35. For a child with an IQ of 35 or below, admission to public schools can be postponed. Postponed until when? A person with an IQ of 35 or below may never achieve a mental age of 5. Forever, therefore, can that person's schooling be postponed. Compulsory school age is from 8 until 16, so the law is saying, "Go away when you're 16 and stay away until you're 8. You say you're not toilet trained, go away. You say you can't move around, go away. You say you act out, go away. You say you have a red shirt on, go away." From your own experience you can multiply the practices in your own mind—practices of great imagination which have led to the exclusion of children from schools.

We did not know when we began how many children were out of school in the Commonwealth of Pennsylvania. I dare say, not one of you could tell me today how many children are out of school in your state, despite the fact that the Pennsylvania law and the law of each state, yours included, requires that the schools maintain a census of children in school and children out of school. But that law has not been respected. As it turned out, and as Mr. Lantzer can report to you, there were at least 14,267 retarded children who had been denied

That was the circumstance those 13 children faced when they turned to the courts to claim, first of all, access to education. What arguments did they make? Their claim rested on two rather straightforward arguments, the first legal and the second factual. First, the legal basis of their claim was the decision of the Supreme Court in *Brown v. Board of Education* in which the Court wrote unanimously as follows:

> Education is required in the performance of our most basic public responsibilities. It is the very foundation of good citizenship. It is a principal instrument for awakening the child to cultural values, in preparing him for later training.

Note these words some years before Gunnar Nirje and others formulated the normalization theory:

> If education is a principal instrument in helping the child to adjust normally to his environment, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. The opportunity of an education, where the state has undertaken to provide it to any, is a right which must be made available to all on equal terms.

If it is doubtful that any child may reasonably be expected to succeed in life when denied the opportunity of an education, is it now even more clear that an exceptional child without an education may not be expected to succeed? For the ordinary child may learn willy nilly, wandering in the street, watching television, riding the school bus, but the exceptional child, by definition, if he or she is to learn, requires a formal, structured program of education.

The exceptional child without an education is not merely in jeopardy "of success," as the Supreme Court put it, but of liberty and life itself. You know very well that the rate of institutionalization among those children who have been deprived of public education is considerably higher. And you know as well that the death rate at those institutions is higher among children who have not had the opportunity of an education which would produce for them those self help skills that enable them, for example, to avoid scalding hot water.

Benefiting Each Child

The factual argument for right to education was equally straightforward. It rested on the now clear proposition that without exception, every child, every exceptional child, every retarded child, is capable of benefiting from an education. There is no such thing as an uneducable and untrainable child. To put it another way, for example, for every 30 retarded children with a proper program of education and training, 29 of them are capable of achieving self sufficiency, 25 of them in the ordinary way in the marketplace and 4 of them in a sheltered environment. The remaining 1 of every 30 retarded children is capable, with a proper program of education and training, of achieving a significant degree of self care.

This fact was presented to the Court in many and diverse ways—in the testimony of Ignacy Goldberg, Columbia Teachers College; James Gallagher, recent Director of the Bureau of Education for the Handicapped; Donald Stedman of the University of North Carolina; and Burton Blatt of Syracuse University. The moment before Jean Hebeler was to take the stand the Attorney General, in the face of that factual evidence, said, "We surrender." The Court in its final opinion on May 5, 1972, noted that the Commonwealth of Pennsylvania had indeed yielded to overwhelming evidence against their position, and the Court complimented the Commonwealth on its wisdom.

I might note for you in particular how some of that came to be. On August 10, some 10 days before the trial, we served on the Attorney General, as is the custom in Federal litigation, the list of witnesses we intended to call. The Attorney General called together Mr. Ohrtman, Director of the Bureau of Special Education, and his deputy at that time, Mr. Lantzer, and their counterparts in the Department of Public Welfare and said to them, "Who are these people?" The answer was that they were the very best in the profession. The Attorney General asked, "What are they going to say?" Mr. Ohrtman and Mr. Lantzer and the others replied, "They are going to say that all children are capable of benefiting from an education." The Attorney General said, "What do we say?" Our friends said, "We say they are right."

The result of the arguments, both legal and factual, was a series of Court orders and injunctions requiring that as soon as possible and in any event no later than September of 1972, all retarded children should be granted access to a program of free public education and training appropriate to the capacities of each of them. The Court further ordered that access to schooling was to be accorded to all of those children within the context of a presumption that placement in a regular class is preferable to placement in a special class, and placement in a special class is preferable to placement in any other program, whether homebound, itinerant, or institutional.

Finally, the Court said that the right of access to education was to be accorded to all retarded children between the ages of 4 and 21—the age of 4 because in Pennsylvania kindergarten was available to many ordinary children at that age and 21 because free public schooling in Pennsylvania as in most states was available if the parent and the child so chose until that age. Consider, those of you whose concern is vocational education, what that must mean for the schooling of children, particularly for the schooling of those between the ages of 16 and 21 who with appropriate vocational address can realize their capacity to be numbered among those 29 of the 30 who may be self sufficient in the ordinary marketplace and at the very least self sufficient in the sheltered workshop.

CREATING A NEW FORUM: THE RIGHT TO BE HEARD

Let me turn now to the second objective, the creation of a new place, a forum where citizens (parents, in particular, and children) may be heard about the nature and quality of that education. The fact of the matter is that if an exceptional child is assigned to a program not appropriate for him, he might as well be excluded from schooling. An example of this situation can be found in an article by Mortimer Garrison and Donald Hammill (1971), both of the Temple University in Philadelphia. They reported that in five county metropolitan Philadelphia at least 25% and as many as 68% of the children assigned to educable classes were misassigned; they had been misclassified. At least 25% and as many as 68% of those children belonged not in the educable class but in regular classes. That study is not unique. It reported facts that other studies across the country have confirmed, for instance Jane Mercer's study in Riverside County in California.

For a long time it has been clear that when the government extends to a citizen a particular benefit, the government may not take that benefit away from the citizen until and unless that citizen is first given notice and the opportunity to be heard about the deprivation. That is clear from a long line of cases dealing with government employment, dealing with determination and reduction of public assistance benefits, and dealing with eviction from public housing. So, the claim was put to the Court that before you can deprive any exceptional child of the benefits of education either by initially assigning him to a particular program or by maintaining him in a program which no longer fits, you must give to the parents and the child a notice—a statement of reasons for the assignment or for the continuing placement—and the opportunity to be heard.

The second legal argument presented to the court to secure the right of parents and children to be heard about the appropriateness of their educational assignments was an argument that proceeds from the consideration of stigma. In the winter of 1971, the US Supreme Court decided an interesting case called *Wisconsin v. Constantino*, 400 U.S. 433 (1971). Wisconsin had a law which authorized the sheriffs and other local officials in towns across Wisconsin to note whenever they found a citizen to be drunk publicly too often and to post that person's name in the town square and outside each of the taverns in the town. Mrs. Constantino found her name posted. She did not like it and turned to the courts saying, "They can't do that, at least unless first they give me notice and an opportunity to be heard." The three judge court in Wisconsin and the Supreme Court agreed, and in its opinion the Supreme Court said some things that are germane to us and were germane to the claim of those 13 children and their parents. The Court said:

> The only issue present here is whether the label or characterization given a person by 'posting,' though a mark of illness to some is to others such a stigma or badge of disgrace that procedural due process requires notice and the opportunity to be heard. We agree with the Court below that the private interest is such that those requirements must be met. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

The result of this argument in the Pennsylvania case was an order of the Court requiring that parents be given notice and the opportunity to be heard before their child's educational assignment can be changed, whether from regular class to special class or among special classes or from special education to homebound instruction or back across that ladder. Before any child's educational assignment can be changed and periodically after assignment, every 2 years automatically and every year if the parents so request, the child and the parent are entitled to notice and the opportunity to be heard. The notice is to set out in detail the reasons for the assignment or the reasons for continuing an assignment. The notice informs the parents of their right to be heard, informs them of the availability of the closest county chapter of the Pennsylvania Association for Retarded Children to assist them in the hearing, informs them of the availability of the mental retardation diagnostic facilities of other departments of the government to assist the parent in the hearing and in independent prescription, and informs the parents of how to secure that hearing.

The hearing is to be held in front of the Secretary of Education of the Commonwealth or his designee. The parent is entitled to access to all of the child's school records prior to that hearing and is entitled to an individual independent evaluation. The parent is entitled to be represented at that hearing by any person of his or her choosing, the chairman of the education committee of the local CEC chapter or the local ARC chapter or a neighbor or a minister or a professor or an attorney. At that hearing, the parent is entitled to present whatever evidence the parent or the child may wish to present with respect to the appropriateness of the educational assignment. The parent is entitled to examine, to question, and to cross examine any officials of the school district who may have information with respect to the assignment. The hearing examiner, the Secretary of Education, or his designee is directed to enter a decision, the sole criteria for which shall be: Is this the appropriate program of education and training for this child, and if it is not, what is?

Consider for a moment the implications of the due process hearing. It is clear that the hearing may be used by the children and by the children's parents to secure their rights and to review the quality of the program presented to the child. But consider also the use that the hearing forum may be to the teacher, the school psychologist, and the administrator. Before that forum was invented, the teacher and school psychologist had little recourse. For example, a school psychologist examines a child and designs an educational program for that child. He sends the program to the superintendent of schools and the superintendent of schools calls back and says, "That's a fine program. Beautifully done. I wish we could make that program available to the child, but we're not able to now, maybe in a couple of years." The only course of action available to that teacher or that psychologist is to return to his or her desk and in frustration and anger slam shut the drawer of the desk. Now, of course, there are other options. The professional in the discharge of his professional duties to that child may turn himself to the hearing and encourage that the question of delivery of the proper program to that child be raised at the highest levels of the educational system, that the question be addressed and be resolved.

Your lot of course is not always a happy one. As I suggested, we have with some ease adopted the agenda that you, the professionals, have set and we have taken it to court. I realize that that in no sense begins to cure the sorts of difficulties under which you labor. I suggest, however, that the creation of the due process hearing offers you another forum in addition to the lobbying and negotiating that you do to reach your professional objectives.

I might just parenthetically mention that there is a growing body of law that would begin to protect the professional space, space for professionals to discharge and to act upon their obligations to their clients. I think of Bennie Parish, a public assistance case worker in Oakland, California, who some years ago was ordered to join the department at 4:00 on a Sunday morning in a house to house search of the homes of public assistance recipients to discover, as you can imagine, if there was someone under the bed or whatever. Bennie Parish said to the Oakland department, "No, I won't go; my clients have the right of privacy and I won't invade that privacy." The department said to him, "You're fired," and the Civil Service Commission in California said, "That's right, you're fired." But then the California Supreme Court unanimously said, "No, you're not fired, nor can you be fired because you have the right in the discharge of your professional obligations to assert the rights of your clients."

Okania Chalk, a public assistance case worker in York, Pennsylvania, went after work to a meeting of public assistance recipients and told them that there were things going on at the office that did not accord with the regulations or with the recipients' rights. Therefore, Okania Chalk suggested that they organize and organize some more. Then York said to Okania, "You're fired," and the Civil Service Commission said, "Right, you're fired," but the Pennsylvania Supreme Court unanimously said, "No, you're not fired because you have the right in the discharge of your professional duties to respect, to protect, and to act on behalf of the rights of those who are your clients." These examples demonstrate that the due process hearing, among other things, is a forum where you may act professionally.

BRINGING UP NEW OR LITTLE KNOWN FACTS

The third use of litigation to which I alluded was the use of litigation to get up front new facts or old facts that too many have not perceived. I need not belabor that use of litigation. As you can imagine, when citizens go to court on cases concerned with the public interest, the media goes too. When Ignacy Goldberg and Jean Hebeler come to Philadelphia the media comes with them. And on the steps of the courthouse while they are waiting to testify, they talk into the microphone and the camera, and on the tube that night people who have never heard it before hear, "All children are capable of benefiting from an education." They hear, "There is no such thing as an uneducable or untrainable child," and that new fact begins to work its way into the decisions of the citizens, the legislature, and others.

EXPRESSING ONESELF

Let me turn then finally to the fourth use of litigation, the use of litigation to express oneself and perhaps to change one's notion of oneself. Two stories may illustrate this use of litigation. On October 7, 1971, the Court ordered that each of the 13 plaintiffs in the Pennsylvania case should be placed within one week in a program of education and training appropriate to them. One of the plaintiffs, a child and her parents, were visited by a school official of one of the defendants and the school official said, "We have the order. Tell you what, we're going to do you a favor, we're going to give Kate another chance." The parents said, and you'll excuse me for translating it, "No, you're not. You're not going to do us a favor; you're not going to give Kate another chance. You're going to give Kate that to which she is entitled."

In the second case, again after that order to place the 13 children in the proper program within one week, another school official defendant came to the house of another plaintiff and said, "We have the order. We will obey it, of course, if you want us to. We have a class for Felix. It is the same class that we had 2 years ago, and we will put him in it if you want us to. You remember, however, what happened a few years ago. Felix went into the class, but the class really wasn't the class for him. In 2 weeks he began to act up. We had to call you and tell you to come and take Felix home. Well, if you want us to, we will obey the order and put him in that class, but we expect that in another 2 weeks we will have to call you again and say, 'Felix is acting up; come and get him and take him home.' Of course, we will tell you about your rights to a hearing and all the rest. We will do it if you want us to, but what good parent would put his child through all of that?" The parents said many things to that school official, none of which I will repeat, at least not in exact terms. But essentially what they said was, "Sir, you're talking the wrong language. It is no longer the case that the child must fit the class. It is now the case that the class must fit the child."

And so it is. It is a new language that suggests a new conception of the handicapped citizen, a new conception of that citizen's place in our society, a new conception of those obligations owed to him by those who act in place of the society, a conception that suggests that handicapped citizens no longer have what they may have by the grace or by the good will of any other person but that they have what they must have by right. It is now a question of justice.

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Due Process of Law: Background and Intent

☐ With the conflict between safeguarding interests and assuring individual rights as a backdrop, the rights of children in many areas of American life are being examined and clarified, often through judicial intervention.

> Children's rights cannot be secured until some particular institution has recognized them and assumed responsibility for enforcing them. In the past, adult institutions have not performed this function partly . . . because it was thought children had *few* rights to secure. Unfortunately, the institutions designed specifically for children also have failed to accomplish this aim, largely because they were established to safeguard interests, not enforce rights, on the assumption that the former could be done without the latter. (Rodham, 1973, p. 506)

Nowhere is this examination more intense than in public education. In this decade, questions of "rights" for public school students have been raised in relation to freedom of expression, personal rights such as hair length and dress regulations, marriage and pregnancy, police intervention, corporal punishment, discipline, and confidentiality of records. While all of these have an impact on handicapped children, none is more pervasive than the right to due process which governs decisions regarding identification, evaluation, and educational placement.

CHILDREN OUT OF SCHOOL

In years past, prior to clarification of the due process obligations of public schools, thousands of children were arbitrarily suspended, excluded, pushed out of school or prevented from enrolling. Based on its analysis of 1970 US Bureau of the Census data on nonenrollment, the Children's Defense Fund (CDF) reported that "nearly two million children 7 to 17 years of age were not enrolled in school" (CDF, 1974). CDF postulated that the two million nonenrolled figure only "reflects the surface" of the total number. While no specific data is presently available on the precise number of handicapped children not receiving an education, it is well known that many are excluded from school. Indicative is the following CDF observation.

> We found that if a child is white but not middle class, does not speak English, is poor, needs special help with seeing, hearing, walking, reading, learning, adjusting, growing up, is pregnant or married at age 15, is not smart enough or is too smart, then, in too many places school officials decide school is not the place for that child. In sum, out of school children share a common characteristic of differentness by virtue of race, income, physical, mental or emotional "handicap," and age. They are, for the most part, out of school not by choice but because they have been excluded. It is as if many school officials have decided that certain groups of children are beyond their responsibility and are expendable. Not only do they exclude these children, they frequently do so arbitrarily, discriminatorily, and with impunity. (CDF, 1974, pp. 3–4)

EXCLUSION AND THE RIGHT TO AN EDUCATION

Much litigation recently has been concerned with handicapped children seeking affirmation of their right to an education and the protection of due process of law (Abeson & Bolick, 1974). This wave of litigation is evidence of the way in which public schools in the past often ignored

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appropriate legal processes in denying these children their rights. The public schools often based such action upon law which was interpreted to give them the right to deny the opportunity of a public education to some children, either on a short term or permanent basis.

Today, it is a matter of public policy that the purported purpose of the public school is to provide every child with the opportunity for a free, public, and appropriate education. This policy makes it clear that to solve the problems a child is having in school by excluding him is not to solve the problems of the child, but of the school. It is unreasonable for the public schools to expel a child because of a behavioral problem (more popularly known as a discipline problem), an inability to learn, or any handicapping condition. The language of the courts is well known in the face of such abuses:

> There is no question that the plaintiff will suffer irreparable harm if her school career is permanently terminated and this may well result if her indefinite expulsion continues . . . . No authority is needed for the fundamental American principle that a public school education through high school is a basic right of all citizens. (*Cook v. Edwards*, 1972)
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> A sentence of banishment from the local educational system is, insofar as the institution has power to act, the extreme penalty, the ultimate punishment . . . . Stripping a child of access to educational opportunity is a life sentence to second-rate citizenship (*Lee v. Macon County Board of Education*, 1974)
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> In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (*Brown v. Board of Education*, 1954)
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> The Court declares that it is the established policy of the State of Maryland to provide a free education to all persons between the ages of five and twenty years, and this includes children with handicaps, and particularly mentally retarded children, regardless of how severely and profoundly retarded they may be. (*Maryland Association for Retarded Children* v. *State of Maryland*, 1974)

Prior to 1971 and the clear directives provided by the courts (*Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 1971; *Mills* v. *Board of Education of the District of Columbia*, 1972; the *Maryland* case cited above; and others), some school exclusion was based on existing law and was in many quarters considered legal and appropriate. Typical were state statutes containing provisions for excluding children with physical or mental conditions or attitudes that prevented or rendered inadvisable their attendance at school or application to study. Often such provisions excluded children who were blind, "dumb," or "feebleminded" for whom no adequate instructional programs had been provided and children who lived more than a minimum distance from a public school or on a route on which no transportation was provided by school authorities.

The rationale that perhaps partially explains the existence of such statutes is represented by a 1919 ruling of the Wisconsin Supreme Court. That ruling provided for the exclusion of a nonphysically-threatening cerebral palsied child on the basis that his "condition" produced a "depressing and nauseating effect on the teachers and school children and that he required an undue portion of the teacher's time" (*Beattie* v. *State Board of Education*, 1919).

Statutory provisions such as those indicated above sanctioned only the most obvious exclusion. Other more subtle devices have been and are today being used to accomplish similar objectives. An example is the use of tuition grant programs in most states, which enable the state and/or local education agency to provide public funds to parents for the purchase of private education programs (Trudeau & Nye, 1973a). Most often, such payments may be provided only when appropriate public programs are not available. These policies have the potential for wealth discrimination and exclusion because frequently a dollar ceiling insufficient to cover the cost of private tuition is placed on the amount of public funds that can be made available. If the family is unable to pay the difference, the child is subject to exclusion or inappropriate placement.

The right to education principle makes clear that when a state undertakes to provide education for any child and does so through the use of public or private programs as a matter of public policy, then the state must assume full financial responsibility for all children. This position has been clearly articulated in the order in *Maryland Association for Retarded Children* v. *State of Maryland* (1974). A series of decisions in New York Family Court also supported the right of every child to a free public appropriate education. Notable is *In Re Downey* (1973), in which the court stated that "to order a parent to contribute to the education of his handicapped child when free education is supplied to all other children would be a denial of the constitutional right of equal protection, United States Constitution, Amendment XIV; New York State Constitution Article XI, Section 1." Similarly in *In Re K.* (1973), the court held:

> It would be a denial of the right of equal protection and morally inequitable not to reimburse the parents of a handicapped child for monies they have advanced in order that their child may attend a private school for the handicapped when no public facilities were available while other children who are more fortunate can attend public school without paying tuition and without regard to the assets and income of their parents.

Another practice used to exclude handicapped children occurs as a function of limited program alternatives. For example, in some states children who need homebound or hospitalized instruction do not receive these services because they are not provided for by law. In other states children are placed on home instruction but then are provided no services or insufficient services to meet the standard of an appropriate public education. Frequently, children who are being considered for special education are assigned to waiting lists prior to an evaluation which is required by law before a special assignment can be made. Unfortunately, these children often wait at home rather than in school, and often for unnecessarily lengthy periods of time.

LABELING AND MISLABELING—CLASSIFICATION AND MISCLASSIFICATION

Regardless of the types of exclusion that have been used and regardless of where they have occurred, the common denominator is that such practices have usually occurred with little or no regard for due process of law. The same observation can be made with regard to the manner in which children are placed in educational programs other than those provided for nonhandicapped children. Other practices associated with placement decisions include identification and evaluation that occur when school personnel suspect that a child may be handicapped and in need of a special program. In ignoring due process, the schools have in many instances, with or without appropriate supporting data, assigned labels to children, subjected children to individual psychological assessment, and altered their education status without parental knowledge or permission. The following, taken from a letter written to one of the authors, aptly describes the problem:

> Harris, my only son, is ten and is somewhat small for his age but has always been very active, playing with friends in his neighborhood. Last spring I got a note asking me to come to school. The pupil adjustment counselor told me that Harris and another boy, who had once been his friend, had been fighting and that Harris was not to return to school for a week. When he returned to school he was immediately sent home again for no specific length of time, but with the message that he couldn't return again until he "learns to behave." When I again went to school to see his teacher, I learned that Harris had been placed in a class for retarded children since last year. I became very upset because I had never been told of this. I did get a note from someone last year saying that Harris was receiving some special help with his studies, but it said nothing about a class for retarded children.

It is well known that labeling in and of itself, even when done carefully and with good intent, may produce negative effects on children. There can be no justification for unnecessarily submitting children to such effects. Three of the major problems associated with labeling practices are:

1. Labeled children often become victimized by stigma associated with a label. This may be manifested by isolation from usual school opportunities and taunting and rejection by both children and school personnel.
2. Assigning a label to a child often suggests to those working with him that the child's behavior should conform to the stereotyped behavioral expectations associated with the label. This often contributes to a self fulfilling prophecy in that the child, once labeled, is expected to conform to the stereotyped behavior associated with the label and ultimately does so. When a child is labeled and placement is made on the basis of that label, there is often no opportunity to escape from either the label or the placement.
3. Children who are labeled and placed on the basis of that label may often not need special education programs. This is obviously true for children who are incorrectly labeled, but it also applies to children with certain handicaps, often of a physical nature. Just because a child is physically handicapped does not mean that a special education is required.

Decisions to label a child, even in his best interest, have grave consequences. Mercer (1975) quoted Alfred Binet's early concern about labeling practices and stigmatization resulting from such practices: "It will never be to one's credit to have attended a special school. We should at the least spare from this mark those who do not deserve it. Mistakes are excusable, especially at the beginning." Mercer added that "we are no longer at the 'beginning' in psychological assessment. Mistakes' are no longer excusable. We believe that children have a right to be free of stigmatizing labels" (p. 140).

Hobbs (1975) put the total issue into perspective. "Categories and labels are powerful instruments for social regulation and control, and they are often employed for obscure, covert, or hurtful purposes: to degrade people, to deny them access to opportunity, to exclude undesirables whose presence in some way offends, disturbs familiar custom, or demands extraordinary effort" (p. 11).

Among the responses to the many challenges that have been directed at labeling and associated practices have been laws passed at both the state and federal levels establishing controls on such practices. In California, for example, state law specifies the type of evaluation to be used for children suspected of being mentally retarded. It also establishes specific standards which must be met prior to proclaiming a child mentally retarded (*California Education Code*, Sec. 6902.085). To specifically guard against the now widely recognized problem of penalizing children through the use of psychological instruments totally inappropriate to their culture, the Federal Education Amendments of 1974 (Public Law 93-380) require that state plans for the education of handicapped children will "contain procedures to insure the testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory" (Sec. 612, (13) (c)).

As has been indicated, there is widespread criticism, both formal and informal, as to the evils of labeling and the associated practices of misclassification and misplacement. While it is true that labeling may produce negative effects, these effects can be eliminated or reduced by better professional practices. The intent of placing a label on a child in the first place is to obtain special benefits for that child; it is not to single the child out for abuse, ridicule, or nonservice. Hobbs (1975) in the report of the massive Project on Classification of Exceptional Children, concluded:

> Classification of exceptional children is essential to get services for them, to plan and organize helping programs, and to determine the outcomes of the intervention efforts. We do not concur with sentiments widely expressed that classification of exceptional children should be done away with. Although we understand that some people advocate the elimination of classification in order to get rid of its harmful effects, their proposed solution oversimplifies the problem. Classification and labeling are essential to human communication and problem solving; without categories and concept designators, all complex communicating and thinking stop. (p. 5)

The dilemma is well summarized by Hobbs:

> Children who are categorized and labeled as different may be permanently stigmatized, rejected by adults and other children, and excluded from opportunities essential for their full and healthy development. *Yet* categorization is necessary to open doors to opportunity: To get help for a child, to write legislation, to appropriate funds, to design service programs, to evaluate outcomes, to conduct research, even to communicate about the problems of the exceptional child. (p. 3)

If one accepts Hobbs' conclusion that labeling and classification practices must continue, then equally important is acceptance of the critical relationship of due process. Given the positive and negative effects that can accrue to a labeled and classified individual, safeguards must be established to control these practices. Due process offers the potential for such a safeguard. Adherence to due process will reduce unnecessary labeling and classification and will contribute to delivery of the specialized services needed by children with special learning needs. Emphasizing the provision of due process to children suspected of being exceptional and in need of special education services is in part an attempt to build an effective review and control mechanism to guard against improper labeling and classification practices.

DUE PROCESS

The PARC Consent Agreement

Due process requirements of the public schools were first, and perhaps most clearly, established in the *Pennsylvania Association for Retarded Children (PARC)* v. *Commonwealth of Pennsyl-*

vania Consent Agreement. Prior to ruling on the question of each mentally retarded child's right to an education, the court approved a stipulation which provided that "no child who is mentally retarded or thought to be mentally retarded can be assigned initially or re-assigned to either a regular or special educational status, or excluded from a public education without a prior recorded hearing before a special hearing officer" (PARC Consent Agreement, 1972). As part of that order a 23 step procedure was established guaranteeing due process, including a hearing, as indicated below:

> Whenever any mentally retarded or allegedly mentally retarded child, aged five years, six months, through twenty-one years, is recommended for a change in educational status by a school district, intermediate unit or any school official, notice of the proposed action shall first be given to the parent or guardian of the child.
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> Notice of the proposed action shall be given in writing by registered mail to the parent or guardian of the child (N.B. being changed to certified mail).
>
> The notice shall describe the proposed action in detail, including specification of the statute or regulation under which such action is proposed and a clear and full statement of the reasons therefore, including specification of any tests or reports upon which such action is proposed.
>
> The notice shall advise the parent or guardian of any alternative education opportunities, if any, available to his child other than that proposed.
>
> The notice shall inform the parent or guardian of his right to contest the proposed action at a full hearing before the Secretary of Education, or his designee, in a place and at a time convenient to the parent, before the proposed action may be taken.
>
> The notice shall inform the parent or guardian of his right to be represented at the hearing by legal counsel, of his right to counsel, of his right to examine before the hearing his child's school records including any tests or reports upon which the proposed action may be based, of his right to present evidence of his own, including expert medical, psychological, and educational testimony, and of his right to confront and to cross-examine any school official, employee, or agent of a school district, intermediate unit or the department who may have evidence upon which the proposed action may be based.
>
> The notice shall inform the parent or guardian of the availability of various organizations, including the local chapter of the Pennsylvania Association for Retarded Children, to assist him in connection with the hearing and the school district or intermediate unit involved shall offer to provide full information about such organization to such parent or guardian upon request.
>
> The notice shall inform the parent or guardian that he is entitled under the Pennsylvania Mental Health and Mental Retardation Act to the services of a local center for an independent medical, psychological, and educational evaluation of his child and shall specify the name, address, and telephone number of the MH-MR center in his catchment area.
>
> The notice shall specify the procedure for pursuing a hearing, which procedure shall be stated in a form to be agreed upon by counsel, which form shall distinctly state that the parent or guardian must fill in the form and mail the same to the school district or intermediate unit involved within 14 days of the date of notice.
>
> If the parent or guardian does not exercise his right to a hearing by mailing in the form requesting a hearing within 14 days of receipt of the aforesaid notice, the school district or intermediate unit involved shall send out a second notice in the manner prescribed above, which notice shall also distrinctly advise the parent or guardian that he has a right to a hearing as prescribed above, that he had been notified once before about such right to a hearing and that his failure to respond to the second notice within 14 days of the date thereof will constitute his waiver to a right to a hearing. Such second notice shall also be accompanied with a form for requesting a hearing of the type specified above.
>
> The hearing shall be scheduled not sooner than 20 days nor later than 45 days after receipt of the request for a hearing from the parent or guardian.
>
> The hearing shall be held in the local district and at a place reasonably convenient to the parent or guardian of the child. At the option of the parent or guardian, the hearing may be held in the evening and such option shall be set forth in the form requesting the hearing aforesaid.
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> The hearing officer shall be the Secretary of Education, or his designee, but shall not be an officer, employee or agent of any local district or intermediate unit in which the child resides.
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> The hearing shall be an oral, personal hearing, and shall be public unless the parent or guardian specifies a closed hearing.
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> The decision of the hearing officer shall be based solely upon the evidence presented at the hearing.
>
> The local school district or intermediate unit shall have the burden of proof.
>
> A stenographic or other transcribed record of the hearing shall be made and shall be available to the parent or guardian or his representative. Said record may be discarded after three years.
>
> The parent or guardian of the child may be represented at the hearing by any person of his choosing, including legal counsel.
>
> The parent or guardian or his counsel shall be given reasonable access prior to the hearing to all records of the school district or intermediate unit

> concerning his child, including any tests or reports upon which the proposed action may be based.
>
> The parent or guardian or his counsel shall have the right to compel the attendance of, to confront and to cross-examine any witness testifying for the school board or intermediate unit and any official, employee, or agent of the school district, intermediate unit, or the department who may have evidence upon which the proposed action may be based.
>
> The parent or guardian shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.
>
> No later than 30 days after the hearing, the hearing officer shall render a decision in writing which shall be accompanied by written findings of fact and conclusions of law and which shall be sent by registered mail to the parent or guardian and his counsel.
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> Pending the hearing and receipt of notification of the decision by the parent or guardian, there shall be no change in the child's educational status.

While the PARC order was limited to the mentally retarded, in the subsequent *Mills* (1972) decision the court ordered implementation of due process procedures closely comparable to the PARC requirements, but including *all* handicapped children.

The Tennessee Law

Shortly after the decisions in the early right to education cases were delivered, provisions for due process began to appear in both state and federal statutes. Among the first was Tennessee's 1972 special education law (*Tennessee Code Annotated*, Chapter 839, 1972) which contained the following section:

> SECTION 8. A. 1. A child, or his parent or guardian, may obtain review of an action or omission by state or local authorities on the ground that the child has been or is about to be:
>
> a. denied entry or continuance in a program of special education appropriate to his condition and needs.
>
> b. placed in a special education program which is inappropriate to his condition and needs.
>
> c. denied educational services because no suitable program of education or related services is maintained.
>
> d. provided with special education or other education which is insufficient in quantity to satisfy the requirements of law.
>
> e. provided with special education or other education to which he is entitled only by units of government or in situations which are not those having the primary responsibility for providing the services in question.
>
> f. assigned to a program of special education when he is not handicapped.
>
> 2. The parent or guardian of a child placed or denied placement in a program of special education shall be notified promptly, by registered mail, return receipt requested of such placement, denial or impending placement or denial. Such notice shall contain a statement informing the parent or guardian that he is entitled to a review of the determination and of the procedure for obtaining such review.
>
> 3. The notice shall contain the information that a hearing may be had, upon written request, no less than fifteen (15) days nor more than thirty (30) days from the date on which the notice was received.
>
> 4. No change in the program assignment or status of a handicapped child shall be made within the period afforded the parent or guardian to request a hearing, which period shall not be less than fourteen (14) days, except that such change may be made with the written consent of the parent or guardian. If the health or safety of the child or of other persons would be endangered by delaying the change in assignment, the change may be sooner made, but without prejudice to any rights that the child and his parent or guardian may have pursuant to this subsection or otherwise pursuant to law.
>
> 5. The parent or guardian shall have access to any reports, records, clinical evaluations or other materials upon which the determination to be reviewed was wholly or partially based or which could reasonably have a bearing on the correctness of the determination. At any hearing held pursuant to this section, the child and his parent or guardian shall be entitled to examine and cross-examine witnesses, to introduce evidence, to appear in person, and to be represented by counsel. A full record of the hearing shall be made and kept, including a transcript thereof if requested by the parent or guardian.
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> 6. A parent or guardian, if he believes the diagnosis or evaluation of his child as shown in the records made available to him pursuant to subsection 5 of this subsection to be in error, may request an independent examination and evaluation of the child and shall have the right to secure the same and to have the report thereof presented as evidence in the proceeding. If the parent or guardian is financially unable to afford an independent examination or evaluation, it shall be provided at state expense.
>
> 7. The state board of education shall make and, from time to time, may amend or revise rules and regulations for the conduct of hearings authorized by this subsection and otherwise for the implementation of its purpose. Among other things, such rules and regulations shall require

that the hearing officer or board be a person or composed of persons other than those who participated in the action or who are responsible for the omission being complained of; fix the qualifications of the hearing officer or officers; and provide that the hearing officer or board shall have authority to affirm, reverse or modify the action previously taken and to order the taking of appropriate action. The rules and regulations shall govern proceedings pursuant to this subsection whether held by the State Board of Education, or by a County, City, or Special School District Board of Education.

8. The determination of a hearing officer or board shall be subject to judicial review in the manner provided for judicial review of determinations of the state or local education agency, as the case may be.

9. If a determination of a hearing officer or board is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the chancery or circuit court. Any action pursuant to this subsection shall not be a bar to any administrative or judical proceeding by or at the instance of the State Department of Education to secure compliance or otherwise to secure proper administration of laws and regulations relating to the provision of regular or special education.

10. The remedies provided by this subsection are in addition to any other remedies which a child, his parent or guardian may otherwise have pursuant to law.

B. Nothing in this Act shall be construed to limit any right which any child or his parent or guardian may have to enforce the provision of any regular or special educational service, nor shall the time at which school districts are required to submit plans or proceed with implementation of special education programs be taken as authorizing any delay in the provision of education or related services to which a child may otherwise be entitled.

The Massachusetts Law

In that same year the Massachusetts legislature also enacted a new special education statute (*Massachusetts Law*, Chapter 766, 1972), containing the following due process provisions:

SECTION 3. In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.

No school committee shall refuse a school age child with special needs admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to, an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counseling services. When the suggested course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes and a comparison of expected outcomes in regular class placement.

If a child with special needs requires of a [sic] medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available in accordance with regulations promulgated jointly by the departments of education, mental health, public health and public welfare in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians or persons with custody may either consent to or reject such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parent, guardian or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the parents, guardians, or person with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would not benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Public Law 93-380

By October 1, 1974, a survey of state policies regarding due process was completed by the State-Federal Information Clearinghouse for Exceptional Children (SFICEC, 1974). The survey revealed that 12 states were required by statute to provide such procedures, 13 were similarly required by regulation, and the remainder had no policy mandate. This situation will undoubtedly change significantly, if not as a result of the continuance of the successful challenges that have already occurred, then in response to the new requirements of Public Law 93-380.

Specifically, Public Law 93-380 requires that a state, in order to retain its eligibility to receive federal funds for the education of the handicapped, must develop a plan, to be approved by the US Commissioner of Education, that will:

> (13) provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children including, but not limited to (A) (i) prior notice to parents or guardians of the child when the local or State educational agency proposes to change the educational placement of the child, (ii) an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification or educational placement of the child, and obtain an independent educational evaluation of the child, (iii) procedures to protect the rights of the child when the parents or guardians are not known, unavailable, or the child is a ward of the State including the assignment of an individual (not to be an employee of the State or local educational agency involved in the education or care of children) to act as a surrogate for the parents or guardians, and (iv) provision to insure that the decisions rendered in the impartial due process hearing required by this paragraph shall be binding on all parties subject only to appropriate administrative or judicial appeal. (Public Law 93-380, Title VIB, Sec. 612 (d) (13A))

It is expected that these plans will be in force as of fiscal year 1976.

PLACEMENT IN THE LEAST RESTRICTIVE ALTERNATIVE EDUCATIONAL SETTING

Another key element of Public Law 93-380 that is closely related to due process is the requirement that handicapped children be placed for educational purposes in the least restrictive alternative setting. Specifically, the law calls for the states to adopt:

> (B) procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Public Law 93-380, Title VIB, Sec. 612 (d) (13B))

Mainstreaming is the educational term often used to describe this programing principle. Using that term, another survey of state policies in this area was conducted by SFICEC in 1974 which revealed that 6 states have laws mandating placement according to this principle, 10 provide the authority through regulations, and the remainder do not as yet have any formal policy governing this programing principle.

The relationship between due process and placement in the least restrictive alternative educational setting is extremely close. Due process establishes the procedures that require the schools to consider all program alternatives and to select that setting which is least restrictive. The basis of this entire concept is the existence of a variety of options or program settings that can be used to provide education to handicapped children depending on their individual needs. The "cascade" or "continuum" approach to programing assumes that educational settings will range from regular classrooms to residential facilities, with a minimum of eight interim alternatives. In the past, few options existed beyond the regular program, the special class or school, or non-public-school programs such as institutions. In the absence of options, children who might be described as mildly handicapped were placed in special classes with little or no opportunity for participation in the school's regular program. Further, in many school districts this decision, like many exclusion decisions, was often reached in an arbitrary and capricious manner, with little or no attention to parent involvement, data collection, consideration of alternatives, or periodic review. Gallagher (1972), for example, reported that "in a number of large city school systems far less than ten percent of the children placed in special education classes are ever returned to regular education" (p. 527).

Clearly, the assignment of a label and/or placement in a special program are actions with potentially grave consequences which may affect the entire life of a child. Some legal theorists have indicated that a decision to place a handicapped child in any setting other than that used for his nonhandicapped peers is inherently restrictive and consequently a deprivation of individual liberty, a circumstance which demands due process of law.

Implementation of due process in this regard means that school officials must be prepared to accept the burden of proof for their recommendation. Regarding the least restrictive alternative principle, the burden of proof must relate to the concept well expressed in the Massachusetts statute that "until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education" (*Massachusetts Law,* Chapter 71B, 1972).

IMPLICATIONS FOR PUBLIC EDUCATION AGENCIES

There is no mystery to why parents, advocates, and others have resorted to demanding that public school officials provide due process safeguards to handicapped children and their families when making educational decisions. As has been indicated, the abuses are legion and the actions have often been characterized by arbitrary and capricious behavior. In many instances, parents have literally been denied the chance of effectively participating in decisions having significant implications for the total life of their children. In commenting on the opportunity for hearings and due process achieved by the PARC litigation, Thomas Gilhool, attorney for the Pennsylvania Association for Retarded Children, said:

> A mechanism is created to assure that the educational program fits the child. The mere fact of a hearing opportunity on change in assignment and every two years thereafter will of course keep all the field professionals on their toes. There is a new instrument for accountability—to the child, to the parent, to the Secretary of Education, and to the teacher as professional. (Lippman & Goldberg, 1973, p. 58).

It is important for public educators to understand that implementing due process may produce many positive benefits. The availability of due process procedures, particularly hearings, provides the parent with the opportunity for holding the professional accountable, a desire of many professionals. In this context, the procedures of due process that require parent-school communication create the opportunity for school personnel to be open and honest with the ultimate consumers of their services. These requirements will also enable educators to adopt an additional procedure that has long been a goal—the provision of individually designed education programs. That objective, too, has been set forth in laws and other expressions of public policy. An example is the *Mills* requirement that "the Board of Education has an obligation to provide whatever specialized instruction that will benefit the child." Requiring that individual plans be developed will lead to further specific determinations as to needed resources including personnel, space, and dollars required for educating each child. Such data can be presented to appropriations bodies such as the local board of education or state legislature.

In addition, individual plans provide the basis for intelligent assessment of a child's progress in relation to the objectives initially established. This concept of periodic review, also a requirement of total due process protection, conforms with good educational programing as well. A 1973 review of state laws and administrative procedures relating to the placement of exceptional children (Trudeau & Nye, 1973b) revealed tremendous variability among the states in this regard. Analysis of the variance indicated that depending on the state, periodic reviews are required continuously, once a semester, routinely within 3 years of initial placement, or never.

Adherence to the provisions of due process also permits the school to adopt a totally new public relations approach to the education of handicapped children. Because the schools can no longer be secretive in the way they deal with these children and their parents, they have the opportunity to be totally honest in explaining to the community what they can and cannot do and the reasons why. One of the criticisms that has been directed at the psychiatric community by Chief US District Court Judge David Bazelon regarding its role in courts of law has been its failure to be honest. Bazelon demands of individuals working with persons who have psychiatric problems: "Tell us you can't handle the caseload, or that you don't know, or that the conditions under which you work make decent evaluations impossible." Such admissions, he reasons, will help "ventilate" the problem, and perhaps, make the issue a ripe candidate for reform (Pekkanen, 1974, p. 27).

Due process also provides an opportunity for public educators to effectively meet the educational needs of children even when there is parental resistance. From time to time, all school agencies face situations in which children who are in desperate need of assistance are prevented from receiving aid due to parental wishes. Procedures can be established by which the process, including hearings, can operate to provide the schools with the opportunity to evaluate and, when necessary, to place the children in special programs.

Finally, educators must be aware that adherence to due process procedures will in no way reduce their professional responsibility or authority. It can provide them with the leverage to do that which must be their goal—to act openly and in the best interests of the children they serve.

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JEAN NAZZARO

Comprehensive Assessment for Educational Planning

□ I don't know that much about fishing, especially fishing with a net, but it seems to be an appropriate, if somewhat homely, analogy with the process of finding children who need special educational services.

In order to catch fish with a net it is necessary to use an appropriate mesh so that fish too small do not get caught. It is also necessary to have a net strong enough to withstand strain.

When a group of fishermen set out to do their work, they must consider several things. First of all, there have to be enough people to man the net, for if one part of the edge is not held, some fish will spill out. Then each person has to be able to handle his part of the job, for if one lets go, the fish will escape. Once the fish are pulled in and a decision has been made as to what to do with the catch, the fishermen turn their attention to the maintenance of their net. They examine each strand checking for weak spots which may need repair or replacement.

If one constructs an analogy between fishing and the delivery of special education services, one can see that the net is like the policies which determine who will be identified for special help and how that determination will take place. The size of the mesh can be compared to the adequacy and comprehensiveness of the screening process which identifies children who can best be served through special education programs. Since the screening process acts as a filter it is important that children referred for evaluation are not caught in an unnecessarily restrictive placement if their needs can be more appropriately met in a less restrictive setting. The quality of the net is like the eligibility identification procedures, which depend on the integrity and commitment of the professionals responsible for supplying direct services. Each fisherman, in this analogy, is represented by a different group of individuals: parents, educators, psychologists, lawyers, and legislators.

For years special educators and parents of exceptional children have been struggling with the enormous task of obtaining public education services; meanwhile, many children have escaped notice while others have been caught in a system where they do not belong. During the late 1960's and early 1970's, parents of children from racial and cultural minority groups demanded appropriate screening and placement procedures for their children. These demands were taken to the courts (*Larry P. v. Riles*, 1972; *Diana v. State Board of Education*, 1970, 1973), thereby involving legal advocates. Decisions in these cases have strongly influenced current state and federal legislation regarding the education of exceptional children.

These same groups were concerned that inappropriate screening and procedures were being used in order to place youngsters in "tracks." It was argued that this kind of programing can permanently affect the student's options for career expectations. In the case of *Hobson v. Hansen* (1967) the issues involved the "tracking system" used in the Washington, D. C. public schools. In his article, "The courts look at standardized testing," Walden, 1975, summarizes the *Hobson v. Hansen* controversy:

> The school district argued that the system based on standardized tests administered to students, was designed to provide each youngster with educational opportunity suitable to his needs and abilities. This argument was rejected by the court, which looked carefully at the operational effects of the tracking system. The court found, for example, that there was a positive correlation between tracks and socioeconomic status and race. Poor Blacks predominated in the lower tracks, while middle class white children were disproportionately represented in the higher tracks. The court concluded that this situation resulted

> from tests that were culturally biased. The tests were not measuring children's ability but rather their racial and socioeconomic backgrounds. The court said, "Because these tests are standardized primarily on, and are relevant to, a white middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic status or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability."
>
> Perhaps even more damning to the school district's case was the closed nature of the tracking system. The court found that children were placed in tracks as early as the fourth grade and were rarely able to move from a low track to a higher one. Since the curriculum in the lower tracks was designed for youngsters who generally did not aspire to a college degree, those assigned to lower tracks had virtually no chance to acquire the background necessary to enter college. The rigid operation of the system, together with the lack of equal educational opportunity implied in the differentiated curricula, caused the court to rule that the tracking system resulted in an inferior educational system for the poor and for Blacks. Such a system, said the court, is unconstitutional and must be abolished.

One response to these lawsuits and the issues being litigated was the passage by the U.S. Congress in August, 1974, of P.L. 93-380, the Education Amendments of 1974. Part of that act requires that states requesting federal money for the education of handicapped children submit a plan to HEW's Office of Education, Bureau of Education for the Handicapped (BEH) which (a) makes a commitment to provide full educational opportunities to all handicapped children, (b) provides due process guarantees, (c) insures that placements will be made in the least restrictive alternative environment, and (d) insures the use of nondiscriminatory testing and evaluation procedures. Government agencies then, especially the Bureau of Education for the Handicapped and the Office of Civil Rights, may be compared to the fishermen in charge of maintenance, repair, and strengthening of the policy network.

To help the states write or revise their state plans mentioned earlier the Bureau of Education for the Handicapped (BEH) drafted a set of suggested guidelines and principles which are frequently called advisories (BEH, 1974). This chapter will review those guidelines as they refer to selection and placement of children, and discuss some of the implications for continuous maintenance of a quality system of services.

Before leaving the subject, one additional part of the fishing analogy needs elaboration. Fishing with a net is an unpredictable business; there is no telling what will be pulled up. Yet, it is fairly certain that a variety of sea life will be collected; the fisherman must decide how to sort out the catch quickly and appropriately.

Screening children for special services also turns up individuals with a variety of problems. The system must be general enough to encompass all exceptionalities and flexible enough to provide an appropriate program and placement for each individual. Laws and guidelines provide the basis for the operation of the system, but each school district will face different combinations of children and thus must devise different service patterns.

Section 613(a) P.L. 93-380 requires each state to guarantee the following:

> Safeguards in decisions regarding identification, evaluation, and education placement of handicapped children including but not limited to (c) procedures to insure that testing and evaluation materials and procedures utilized for the purpose of classification and placement of handicapped children will be selected and administered so as not to be socially or culturally discriminatory.

Many times, the terms used to describe procedures for examining a child to determine his/her need for special services are varied and somewhat confusing. In this chapter the terms "assessment" and "evaluation" will be used interchangeably to mean a comprehensive examination of several dimensions of a child's behavior and adjustment which may include but is not limited to testing. "Testing" refers specifically to the use of instruments, both group tests and individual tests. "Screening," which usually precedes assessment and evaluation, refers to activities performed for the initial identification of children with suspected special needs. "Placement," which follows assessment, means the assignment of a child into a program. The purpose of the assessment is to determine the specific program that is needed by the child with the expectation that the assigned placement is the setting in which the needed program can be provided. Placement assignment of a child to a special education program does not necessarily mean a physical move into another classroom; rather it is, or can be, placement in a variety of settings, or modified educational strategies.

PARENT INVOLVEMENT

Part of the BEH advisories addressing nondiscriminatory testing and placements sets forth principles concerning parental involvement and approval. It is recommended that "written parental permission should be obtained before any individual evaluation procedures are carried out on a child" and that "clear procedures regarding evaluation should be set out in each local education association (LEA) and made known to parents e.g. the kinds of tests, how long the evaluation of a child usually takes, etc." (BEH,1974, p.26).

For many years the schools assumed sole position of authority in making decisions about testing and placing children; parents were not accorded much status in the decision making process. Typically, a teacher would refer a child for testing and a school psychologist would come and test. It was not until a placement decision had been made that the parents would be consulted. School administrators generally knew which parents should be consulted and which would be too intimidated to make demands or to voice complaints. It has only been recently that LEA's are being required to treat parents as equal and knowledgeable partners in the educational decision making process. Although the BEH guidelines refer specifically to written permission for individual evaluations, some attention should also be given to informing parents when standardized group tests are to be given and how the results will be used. Parents should be given the option of refusing to permit the child to be tested if they feel that the test would inaccurately reflect the child's level of functioning. If a child is not fluent in English, for example, his performance on an English language group test would not reflect his knowledge accurately. Or, if a child has a learning disability which involves visual perception problems his ability to handle printed material may be limited. Testing children with instruments to which they cannot respond to for reasons other than their knowledge of the material is meaningless.

For both group tests and individual assessments, school districts should consider providing the following information to parents and children before a test is given:

1. A description of the test with some sample items.
2. A statement concerning the purpose of the test.
3. An explanation of how the results will be used.
4. A statement as to whether or not the results will become a part of the student's permanent record.
5. A list of the rights of parents (Abeson, Bolick, & Hass, 1975) which includes the right (a) to review all records related to referrals for evaluation (individual assessment); (b) to review the procedures and instruments to be used in the evaluation; (c) to refuse to permit the evaluation (in which case the local education agency can request a hearing to try to overrule the parent; (d) to be fully informed of the results of the evaluation; and (e) to get outside evaluation for their child from a public agency, at public expense if necessary.

Recognition of the necessity for increased parental involvement and increased sharing of information with parents was one theme of a November, 1975, meeting on standardized testing, attended by representatives from 35 education organizations. Among the major items agreed to by all participants at the meeting (sponsored by the National Association of Elementary School Principals and the North Dakota study group on evaluation) were the following:

1. Parents and teachers need to be more actively involved in the planning and processes of assessment.
2. Any results of assessment reported must include explanatory material that details the limitations inherent in these measures.
3. Standardized tests used in school should be made available to educators, parents and the public to give these groups a better opportunity to understand and review the tests in use.

INITIATION OF EVALUATION REQUESTS

In the past, only referrals originating within the system, i.e., coming from a teacher or other professional, resulted in individual evaluations. Occasionally a referral would be made upon the request of a parent, but it was not obligatory for the principal to do so. Gorham, Des Jardins, Page, Pettis, and Scheiber (1975) declared:

> Thus, the parent who seeks special services for a handicapped child may have to "take on" the public school hierarchy for the sake of his child. He faces several problems: the problem of proving the need for a look and then a second look at a child's placement. (p.170)

> A parent who feels that there is something wrong and that his child should have a diagnosis to pinpoint the problem usually must wait a long time—sometimes a year or more.(p.177)

Now the BEH advisories provide that "Parents should have the power to 'trigger' the evaluation procedure i.e., to request the LEA to conduct an evaluation on their child when they feel he/she is in need of a special education program." (BEH, 1974, p.26) Consequently, states are now being advised to expand their delivery systems to serve children who are referred by their parents. Once parents know they can obtain this service, there may be a surge of referrals resulting in increased staffloads and/or the purchase of outside evaluations. On the other hand, no one is more sensitive to a child's development than his parents, for they after all, are the ones who are ultimately responsible for monitoring their child's progress. They are the only people who, without interruption, observe the developing child.

INVOLVEMENT IN PLACEMENT DECISIONS

Besides the option of granting or refusing permission prior to testing and an explanation of procedures, parents should be assured of a full report of results and given notice of any proposed change in placement. The BEH guidelines provide the following suggestions:

> Parent should be given a full report of the results of the evaluation. Prior notice must be given to parents whenever decisions are to be made which will affect the educational status of their child—including decisions based on both the initial evaluation and all subsequent reviews; and permission must be obtained from the parents before such decisions are implemented (BEH,1974,p.26)

Suggested procedures on such a report are quite specific in *A Primer on Due Process* (Abeson, Bolick, & Hass, 1975). "Within 15 days after completion of the evaluation, the parent shall be given, in writing in the primary language of the home and in English, and orally in the primary language of the home, the results of the evaluation, the educational implications, and a written individualized educational plan." Such a written report also allows the parents to keep records. In the past parents were usually not given written reports with the results of an evaluation. One parent writes, "What happens to the reports? They are collected in manila folders that follow the child from clinic to clinic and school to school. This would be fine if one master folder containing copies of all the information were in the hands of the parents."(Gorham,1975). In today's mobile society, it is good sense to allow parents to carry the child's records to new locations, for it sometimes takes weeks and even months for children's records to catch up to them.

Where the BEH advisories stipulate "that prior notice must be given . . .," they refer to a written announcement to the parents that the evaluation placement committee is going to review the educational status of the child. The BEH guidelines define "notice" as "written statements in English and in the primary language of the parents' home, and oral communications in the primary language of the home" (BEH,1974,p.7). It should be noted that this directive does not say anything about the parent being invited to the committee meeting. In reviewing the situation in California, which was among the first states to use the placement team concept for educable mentally retarded (EMR) and educationally handicapped (EH) children, the following condition was reported (Kirp, Kuriloff, and Buss, 1975).

> Special educators, while expressing their willingness to meet with a parent or representative at the admissions committee meeting, fear that the presence of an outsider might force bargaining further underground. The committee's handling of children, one program supervisor remarked, is "just too impersonal for the average person to understand . . .It would appear cruel." The presence of such an outsider might also pose a threat to the committee's usual style of operation and, more basically, to the credibility of its decisions. (p.374)
>
> Sometimes—to save time—permission for placement is obtained during the same visit as permission for testing,even though the school does not know into what special program (if any) the student should be placed.(p.372)
>
> The permission-before-decision approach gives the committee a blank check to place a student wherever it wishes, and negates any significant parental role. (p.375)

If parents are dissatisfied with the recommendations of the committee they are entitled to a due process hearing. Parents should be apprised of this recourse at the time they are notified that a placement decision is scheduled.

MUTIFACTORED ASSESSMENT

Awareness of the need for comprehensive assessment was triggered by the court cases of the early 1970's which dealt in part with the placement of minority children in EMR classes on the basis of single IQ scores. (*Larry P. v. Riles*, 1972; *Diana v. State Board of Education*, 1970). In 1971 the California legislature pioneered changes in assessment practices when they amended the education code to provide a legal framework for pluralistic assessment:

> No minor may be placed in a special education program for the mentally retarded unless a complete psychological examination by a credentialed school psychologist investigating such factors as developmental history, cultural background, and school achievement substantiates the retarded intellectual development indicated by the individual test scores. This examination shall include estimates of adaptive behavior . . .Such adaptability testing shall include but is not limited to a visit, with the consent of the parent or guardian, to the minor's home by the school psychologist or a person designated by the chief administrator of the district.(California Education Code; Sec.6102.08)

Although the initial reaction was in response to the use of tests judged to be inappropriate for certain minority group children, the need for comprehensive assessment has been generalized to all children.

The BEH guidelines request that assessment be viewed from two reference points, the school and the home. They stress the need for a multifactor and multisource assessment. This means that many kinds of behavior should be examined using a variety of techniques such as observations, interviews, and classroom performance as well as more formal tests. Specifically, the advisories provide that "an assessment should be made on the child's educational functioning in relation to the academic program of the school; and the results of this assessment should be expressed in terms of both the child's strengths and weaknesses. The assessment should be comprehensive, using a full range of available instrumentation and observations, including diagnostic tests and other appropriate formal and informal measurements" (BEH,1974,p.27).

Concern about the use of standardized tests for assessing the general school population was evidenced in 1972 when more than 8,000 delegates of the National Education Association (NEA) passed several resolutions calling for a total testing moratorium (Bosma, 1973). The key policy statement was submitted by the Michigan delegation: "The National Education Association strongly encourages the elimination of group standardized intelligence, aptitude, and achievement tests to assess student potential or achievement until completion of a critical appraisal, review, and revision of current testing programs."

Following that convention, a task force on testing was formed and a final report was presented to the 54th representative assembly of NEA in July 1975. Of note is the statement that "both the content and the use of the typical group intelligence test are biased against those who are economically disadvantaged and culturally and linguistically different. In fact, group intelligence tests are potentially harmful to all students," (NEA, 1975). "Whenever intelligence tests are adminstered, steps should be taken to assure that the IQ score, per se, will not be used in making inferences about the child's level of intelligence or learning potential; instead the full test (including protocols, content, subtests, etc.) should be interpreted by the qualified examiner who administered the test." (BEH,1974,p.28). The BEH advisories direct that "any 'classification' of students for educational purposes should consist of a description of the types of educational programs and services needed by each child to learn to the fullest extent possible in the school setting, rather than categorizing the child by some diagnostic label which is unrelated to educational programing" (BEH,1974,p.28). While norm referenced achievement tests are frequently used in the assessment process, their mode of construction may fail to reflect the academic program of the school. In constructing an instrument to measure learning as an outcome of instruction, test items should be selected which most students fail before instruction but pass after instruction.

It is Popham's opinion (1975) that in norm referenced achievement tests these very items are eliminated because they do not produce variance, and variance is an absolute requisite for comparing individuals. Items answered correctly by 50% of the examinees maximize a test's response variance. But items which are answered correctly by a larger proportion of examinees have to be modified or eliminated since they do not contribute sufficiently to the production of response variance. In general, the items on which most students perform well reflect the concepts which teachers believe to be important and on which they have spent the most time teaching. But, on oft revised achievement tests, items measuring important concepts are systematically excised from the tests. What you have therefore, over time, is an achievement test which functions exactly like an intelligence test because it has been the untaught information that has been retained while the things actually taught in school have been eliminated.

On the other hand, by using criterion referenced tests which measure the child's knowledge against a set criterion, one gets a much clearer picture of what the child knows and what he has yet to learn. Criterion referenced assessment leads naturally to an educational plan that addresses the gaps in the child's knowledge base. Thus the results of the assessment can be expressed in terms of both the child's strengths and weaknesses.

Measures of Psychomotor and Sensory Development

A second aspect of school related assessment reflects psychomotor and sensory development. BEH's advisories specify that "an assessment also should be made of the child's psychomotor and sensory development, through the use of developmental scales (e.g., the Denver Developmental Scale, informal checklists, etc.), and audiological ophthalmological or optometric examinations" (BEH,1974,p.28).

The language of this advisory subtly focuses on possible problem areas rather than on strengths. Although it is essential to discover a child's limitations, it is also valuable to know a child's personal learning style.The emphasis in assessment should be on a child's strengths rather than on his weaknesses. Traditionally responsibility for learning has been placed on the child, but few choices or alternatives regarding ways to learn new things have been provided for him. (Aiello, 1975) People learn through their visual, auditory, and tactile senses. Some learn better by listening while others prefer reading, and most people prefer to manipulate materials physically while they are learning about them. Informal diagnostic techniques can be used by the teacher to determine how a child learns best. Consideration of such a learning style in developing his individual educational plan should greatly strengthen the total program.

Measures of Adaptive Behavior

The final area of assessment is adaptive behavior as reflected in both school and community settings. The advisories provide that

> An assessment also should be made of the child's adaptive behavior in the school setting based on observations and records, and, where appropriate, the use of adaptive behavior scales. Information from the home should include (1) the child's adaptive behavior in the home, community and neighborhood, as perceived by his parents or guardians or principal caretakers, (2) the sociocultural background of the family, and (3) the child's health and developmental history. (BEH,1974,p.28)

California studies to determine the racial and ethnic composition of classes for the mentally retarded, showed that previous assessments clearly lacked measures of adaptability. Mercer (1975) reported:

> Although official definitions of mental retardation require "that an individual manifest deficiencies in both adaptive behavior and intellectual functioning," . . .we found that most community agencies, especially the public schools, were relying mainly on measures of 'intelligence' in 'diagnosing' mental retardation. Ninety-nine percent of the labeled retardates nominated by the public schools had been given an intelligence test, but only 13 percent had received a medical diagnosis. The only measure of 'adaptability' was implicit. If a child's behavior violated the norms of the teacher and he was referred for psychological evaluation, he was judged to be maladapted. . . .No community agency systematically assessed the child's ability to perform complex nonacademic tasks in his home, neighborhood, and community. Assessment procedures were unidimensional. They focused only on the narrow band of behavior sampled in the psychometric situation. . . .(p. 143)
>
> Traditional assessment procedures evaluate whether the child is meeting the expectations of one social system—the school. If he is referred by his teacher for psychological assessment, we know that he has somehow been identified as a "problem" and is not meeting educational norms. Standardized achievement tests and intelligence tests are formal assessments of competence in terms of the norms of the school. There is a high correlation among all these assessment procedures because they all represent the expectations of a single social system which is the culture bearer of the dominant society. To secure a multidimensional view of the child, we need an assessment in terms of the norms of social systems other than those represented by the clinician, psychologist, teacher, and school.
>
> In assessing a child's adaptive behavior, we wish to secure information about his social role performance in the family, neighborhood, and community as perceived by significant others in

> those social systems . . . The construct of adaptive behavior includes both the development of skill in interpersonal relations and the emerging ability to play ever more complex roles in an expanding range of social systems. The sociological concept of the social role is the unifying focus. (p. 154)

Culturally and Linguistically Appropriate Assessment

Another aspect of assessment addresses adaptive procedures for children with linguistic or cultural differences. This is probably the most critical area of nondiscriminatory testing as it is implicitly stated in P.L. 93-380. The BEH guidelines recommend:

> A procedure also should be included in terms of a move toward the development of diagnostic-prescriptive techniques to be utilized when for reasons of language differences or deficiencies, non-adaptive behavior, or extreme cultural differences a child cannot be evaluated by the instrumentation of tests. Such procedures should insure that no assessment will be attempted when a child is unable to respond to the tasks or behavior required by a test because of linguistic or cultural differences unless culturally and linguistically appropriate measures are administered by qualified persons. In those cases in which appropriate measures and/or qualified persons are not available, diagnostic-prescriptive educational programs should be used until the child has acquired sufficient familiarity with the language and culture of the school for more formal assessment. These evaluation procedures should also assure that persons interpreting assessment information and making educational decisions are qualified to administer the various measures and qualified to take cultural differences into account in interpreting the meaning of multiple sets of data from both the home and the school. (BEH,1974,p. 29)

The first step that should be taken in testing children who may have problems coping with assessment instruments is to sensitize the examiner and those who will be using the test results to the potential biases inherent in the protocols. Examiners and teachers who have themselves taken sample tests developed to demonstrate biases have a much better idea of what the child faces.(Nazzaro, 1975)

There has been some hope that culture free, or culture fair tests would be the answer to assessment problems, but little success is discernible in developing such instruments. According to Henry C. Dyer of Educational Testing Services, "There are only two conditions under which a test can be culture fair: (1) either the learning required to perform acceptably on the test is commonly and equally available to all people of all cultures, or (2) the stimulus material on the test is completely novel to all people of all cultures. Neither of these conditions is obtainable." (Purvin, 1975)

Podilla and Garza (1975) note that "efforts to develop culture-free tests were doomed to failure from the beginning. All human experience is modulated by human society, and no test can be experience free. The materials used in the test, the language of the test, the manner of getting the testee to respond, the criteria for choosing which responses to record, the categories into which responses are classified, the test's validity criterion—all are culture bound." Translated tests are also rife with problems because of the number of dialects, the scarcity of normative data, and the lack of experienced examiners.

The most valuable phrase in the BEH directive regarding adaptive procedures for children with linguistic or cultural differences is "In those cases in which appropriate measures and/or qualified persons are not available, diagnostic-prescriptive educational programs should be used . . ." Implementation of this directive will result in less use and dependence upon the IQ number and perhaps a diminishing of the self fulfilling prophecy phenomenon, that a child was expected to achieve only to the degree that was suggested by the IQ number.

Reasonable Evaluation Procedures and Instruments

Although no specific tests are recommended by the BEH guidelines, there is a statement concerning the selection of evaluation materials that meet the test of reasonableness.

> The various evaluation materials and procedures used for purposes of classification and placement of handicapped children should meet a test of reasonableness in the eyes of competent professional persons and informed laymen; and such procedures should be administered by qualified persons under conditions which are conducive to the best performance of the child. (BEH,1974,p. 26)

Meeting a test of reasonableness is open to broad interpretation, but surely one dimension of reasonableness would be to insure that the assessment procedures used are appropriate for the individual child. If a child is unable to respond correctly to a test item because of circumstances unrelated to the test, then the test is unreasonable or unfair. There are three types of problems a child may have: problems of reception or perception, problems of expression, and problems of conceptualization.

Blind children, deaf children, some learning disabled children, and children who do not understand English would be examples of youngsters with receptive or perceptive problems. Children who have physical limitations such as cerebral palsy, those who have speech problems and youngsters who speak a language other than English as a primary language, or who speak a dialect, have expressive problems. Finally, there are those children who cannot conceptualize or process the questions being asked because of some central nervous system dysfunction or because of a different conceptual, cultural, or racial frame of reference. (Nazzaro, 1975)

Most psychologists who do assessment in the schools do not have a broad knowledge of alternative instruments specifically designed for children with special needs. One can look at a "psychological" almost anywhere in the country and find the results of a WISC or Binet, a Wide Range Achievement Test, a Bender Gestalt, and perhaps some type of psycholinguistic test. The narrative will probably state that the results of certain subtests or items are not valid because of the child's specific handicap, but the scores are nonetheless recorded. In the case of group tests, children with hearing handicaps are unable to receive the instructions, children with visual perceptual handicaps are unable to read the test material, children with different conceptual frames of reference (which may include gifted children) do not always select the "best" multiple choice answers. One way to meet the test of reasonableness, then, is to make sure that professional persons, informed laymen, and qualified examiners are thoroughly acquainted with potential mismatches between particular assessment instruments and an individual's limitations.

Development of an Individual Educational Plan

One of the most revealing exercises in which a school psychologist can engage is to present a teacher with a cumulative record and pre-1975 psychological evaluation of a child and ask that teacher to develop educational plans from the information. Generally, it can't be done; perhaps, it can't be approached. The kind of information collected through testing has generally been of little use in terms of helping a teacher plan a program. The BEH guidelines address this problem and focus on the intent of evaluation: "The intent or effect of the evaluation should be the development of an educational plan for the child, based on a description of his/her strengths and weaknesses. Whenever possible, parents should participate in the development of the educational plan for the child" (BEH,1974,p. 27).

This advisory is no longer simply a recommendation. The long debated Senate Bill 6, now P.L. 94-142 requires each local educational agency in the state to maintain an individualized written education program for each handicapped child, review it at least annually, and revise its provisions when appropriate with the agreement of the parents or guardian of the handicapped child.

P.L. 94-142 defines "individualized education program" as follows:

> A written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

When an evaluation is undertaken with the intention of developing an educational plan, the approach to the total assessment process changes from one of identification to one of determination of what the child knows and does. This can provide a baseline from which to project what the child should be able to do and how long it will take to learn how to do it. The CORE Evaluation Manual developed by the Department of Education in Massachusetts presents some useful guidelines. (Audette, 1974) No one should be asked to describe what the student does not do or cannot do; such descriptions are of limited usefulness. The entire emphasis of this process should be positive—what the student does. Such information can be derived from information about performance observed under special conditions and further tested by team members. Constraints imposed upon the student's performance should be derived from information provided by a physician. Based on this information, objectives which are very specific and readily observable can be prepared in detail for the student.

The heart of the educational plan is the specification of objectives which will result in the provision of a quality education for that student. Three criteria must be met in outlining these objectives:

1. They must be developmentally rational: that is, if the student is using two word sentences, the objective should indicate that the student will be using three, four, and five word sentences. The long term goal will be that the student will use compound/complex sentences, but the most immediate objective should indicate gradual increments toward that ultimate goal.
2. They must be sensitive to parental priorities. If the student is demonstrating acting out behaviors, such as hitting people or destroying property, objectives should be set to eliminate this behavior so that the student can function in an increased number of environments, thereby increasing the student's options.
3. Most important, all objectives must relate to the student's movement toward a less restrictive setting. Therefore, if a student is in a substantially separate program, objectives should be established so that, when met, the student is placed in more normal education programs for at least part of the day.

There is no doubt that some kind of assessment is necessary and desirable in order to let the child, the teacher, the parents, and others involved in the educational process know whether or not there has been a change in the desired direction as a result of instruction. The most promising kinds of assessment for this purpose may well be a combination of criterion referenced tests to find a beginning point, and then continuous measurement techniques to determine how learning is progressing.

All evaluation procedures have potential biases and any "one shot" sample of behavior, whether it be a test, an observation, or any other technique, tells little about a person's ability to learn. Only by sampling over time can one gain a fairly accurate picture of a child's potential.

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ALAN ABESON

Confidentiality and Record Keeping

□ Peg Gorham (Gorham et al., 1975) the parent of a handicapped child, suggests to other parents that in dealing with the public schools they should "ask for copies of your child's records." She adds, however, "You probably will not get them." This directive and prediction describe well the situation that has existed for many years in American education for both parents of handicapped and nonhandicapped children.

In recent years many problems in record keeping, record fabricating, and record sharing by the public schools have been described:

- Information about children and their parents was often collected without informed consent from the parents or even the opportunity for them to provide informed consent.
- Permission for collecting information for specific purposes was often subsequently disregarded and the same information was used for different purposes.
- As a matter of policy schools have failed to inform parents as to the contents of a child's records and the purposes for which the records were maintained and used.
- Schools have refused to make available copies of a child's records or information about them when sought by parents, thus eliminating any possibility for an external review of the accuracy and appropriateness of the records.
- Schools have not automatically destroyed unneeded records on a periodic basis during a child's school career or at the conclusion of the educational program at that school.
- There has been a lack of appropriate policies and procedures to control which school personnel may have use of the school records and for what purposes.

RECORD KEEPING ABUSE AND THE HANDICAPPED

As indicated, these problems have occurred with regard to all children in school. However, the likelihood of exceptional children and their families being subjected to these practices is even greater. There are many reasons for this greater vulnerability, including the following:

- The nature of being identified as exceptional and possibly or definitely in need of special education services requires the collection and maintenance of greater amounts of data than is needed for nonhandicapped children.
- The generally increased sensitivity of educators to the positive and negative implications of labeling children as exceptional encourages school systems to produce and collect documentation.
- Obtaining services from multiple agencies, which is often required for the appropriate education of exceptional children, often leads to less than adequate controlling and monitoring mechanisms with regard to the sharing of information.
- Parents of handicapped children in many cases are so desperate to obtain services for their children that, even when aware that erroneous information is being recorded, they do not object for fear that the opportunity for those services will be withdrawn.
- Since many programs for the handicapped are isolated in special schools and other facilities, records are often maintained with the program without adequate collection and use policies.

RECORD KEEPING AND THE COMPUTER

In addition to the abuses described above, the increasing use of computers to record and generate information poses another potential problem for the handicapped. In 1972 recognition of the potential dangers of advanced technological systems in record keeping led the then Secretary of Health, Education, and Welfare, Elliot Richardson, to establish the Secretary's Advisory Committee on Automated Personal Data systems.

The first committee role was to define *personal data*. It was considered to be

> all data that describe anything about an individual, such as identifying characteristics, measurements, or test scores; that are evidence of things done by or to an individual, such as records of financial transactions, medical treatment, or other services; or that afford a clear basis for inferring personal characteristics or things done by or to an individual, such as the mere notation of an individual's presence in a place, attendance at a meeting, or admission to some type of service institution. (Martin & Parsons, 1973)

The most important work of this committee was its five principles governing data collection systems for personal data. These principles can effectively serve to guide school district practice regardless of whether or not such systems have been automated. The five principles established were:

> 1. There must be no personal-data recordkeeping systems whose very existence is secret.
> 2. There must be a way for an individual to find out what information about himself (or herself) is in a record and how it is used.
> 3. There must be a way for an individual to prevent information about himself that was obtained for one purpose from being used or made available for other purposes without his consent.
> 4. There must be a way for an individual to correct or amend a record of identifiable information about himself.
> 5. Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended uses and must take precautions to prevent their misuse. (Martin & Parsons, 1973)

THE BUCKLEY AMENDMENT

In 1974 the US Congress' response to the record keeping and problems of confidentiality described above became law in the form of The Family Educational Rights and Privacy Act (Title V, Secs. 513,514, P. L. 93–380), otherwise known as the Buckley Amendment. The purpose of this statute is to give to all parents of public school students under 18 the right to see, correct, and control access to student records. (Most of the discussion of the Buckley Amendment is taken or adapted from *Your School Records*, 1975.)

Under the provisions of the Buckley Amendment, schools are required to notify all parents of their legal rights. This should include a description of the procedures for obtaining access and for removing false or misleading material. Any school that receives federal education funds from the Office of Education (OE) must follow the procedures required by the federal law. Most public schools and universities receive money through at least one OE program.

The Buckley Amendment provides that all "records, files, documents and other materials which contain information directly relating to a student," and which are maintained by an educational agency, such as an elementary school, an office of a school district, or a university must be available within 45 days of a request. The only student records that are exempt from this provision are:

1. A teacher's or counselor's "personal notes" (notes that a school official makes for his or her own use and that are not intended to be shown to anyone else, except a substitute).
2. Records of school security police, if they are kept separate from the rest of the school's files, if the security agents do not have access to any other school files, and if they are used for law enforcement purposes only within the local area.
3. Personal records of school employees. The location of the record does not matter; discipline folders, health files, and grade reports and other records found in a cumulative folder are all covered. Schools are required to provide parents with a list of all the records maintained on students.

While the Buckley Amendment permits individuals over 18 years of age to see their own records, no matter how long ago graduated or how recently enrolled, there are some additional records that can be withheld:

1. Psychiatric or "treatment" records (but parents or those over 18 can let a doctor of their own choice look at them).
2. Confidential letters of recommendation placed in a college file, prior to January 1, 1975, which have been used only for the purposes for which they were requested.
3. Financial records of parents.

Those over 18 who have applied to a school but have not been accepted, do *not* have a right, under the Buckley Amendment, to see records collected during the application process. The act also specifies that schools may not destroy the records after they have been requested. Further, parents have the right to examine the records personally and school officials are in violation of the law if they agree only to read to the parents from the records. Parents also have a right to receive an explanation of any items in the record that they do not understand. Under the Buckley Amendment, parents may obtain copies of the records when the records are transferred to another school and when information is released to third parties. In addition, if receiving copies is the only practical way parents can obtain access (for example, when the parents are in California and the records are in New York), the school is responsible for making copies. Local school regulations will govern requests for copies in other situations and will also establish the amount that can be charged for each copy. Parents also have the right to see the records for purposes of taking notes.

If the parents feel that any information contained in the record is false or misleading, they can informally request of school officials that it be corrected or discarded. If the school officials refuse, the parents may request (in writing) a hearing. The hearing should be a meeting between the parents and school officials, which is presided over by an impartial hearing officer. The purpose is to let each side present evidence about the school record in dispute and to let the hearing officer decide who is right. Each school must establish its own procedures for conducting hearings. These rules will determine who is permitted to act as a hearing officer and how long it will be until a decision is reached. The procedures must comply with federal regulations, which call for scheduling the hearing within a "reasonable" period of time. Parents, as in placement hearings, have the right to bring counsel or other persons to help support their position. If the decision reached is against the parents, they may insert into the record a written statement of their objections to the material, indicating why they think it is false, misleading or inappropriate.

The act also specifically limits who may use a child's records without parental consent:

1. School officials in the same district with a "legitimate educational interest."
2. School officials in the school district where a child intends to transfer (but only after the parent has had opportunity to request a copy of the records and to challenge their contents).
3. Various state and national education agencies, when enforcing federal laws.
4. Anyone to whom the school must report information as required by state statute in force prior to November 19, 1974.
5. Accreditation and research organizations helping the school.
6. Student financial aid officials.
7. Those with court orders.

Under federal law, police, probation officers, and employers cannot see or receive information from student records without obtaining parent consent. However, if before November 19, 1974, a state had in effect a statute requiring schools to give these individuals such data, then schools in that state have the discretion to do so.

Finally, the act requires that with each child's records the school must keep a list of everyone, except school employees, who requests and receives information about the child. The act also gives parents a right to see that list.

A SPECIAL CONCERN

The Buckley Amendment and the recommendations of the Secretary's Advisory Committee on Personal Data Systems are testimony to the fact that in the past record keeping and their use for all citizens, and especially those who are exceptional, have been inadequate. In addition to the Buckley Amendment, the Congress in the same act also addressed records specifically relating to the handicapped when it required the states to adopt amendments to their state plans for fiscal year 1976 providing that "policies and procedures that are developed regarding the identification and location of all handicapped children will be established in accordance with detailed criteria prescribed by the Commissioner to protect the confidentiality of such data and information by the state" (Sec. 613(b)).

Those who implement these policy directives as they provide education for exceptional children must recognize first that

> where information privacy is concerned, the exceptional child may dwell in a special limbo created by inferior status as a child; the additional stigma of disease, deviance, or extraordinary ability; and the general obscurity of the laws and customs governing the use of personal information in this society. (Lister, 1975, p.546)

Second, they must realize that

> when record information is incorrect or inappropriate to the decision being made, or when it is shared with persons who may misinterpret its meaning, it may perpetuate a wrongful or misleading characterization of the individual's habits, abilities, or conduct. As a result, we must continually reconsider the policy questions of how wide and deep we wish our institutional memories to be and how readily information from them should be shared. (Lister, 1975, p. 545)

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RICHARD A. JOHNSON

Renewal of School Placement Systems for the Handicapped

□ Stated quite directly, educators by and large are operating anachronistic special education referral and placement systems and are condoning, if not propagating, policies and practices which are generally inimical to the needs and rights of students. The day to day business of matching a school's human and material resources to the unique needs of an individual handicapped student has, in the history of education for the handicapped, been characterized by the following:

- Referral of a student to special education for assistance based on a problem the *teacher* is having with the student rather than on specific and clearly identified student needs.
- The notion that a system supported by, in many cases, less than 5% of school district resources can effectively replicate a quality instructional program and succeed where "regular" education, supported by 95% of the resources, has failed.
- The assumption that special educators have in their operational system major theory, technology, materials, or instructional magic not available to teachers at large.
- The misuse of one form of providing special instruction and services—the special class.
- The wholesale placement of handicapped children in normal programs without attention to adequate evaluation and procedural safeguards under the guise of least restrictive alternative programing.
- The documented tendency for permanence and rigidity in placement process and outcome—the "door with the handle only on the outside" syndrome (Johnson, 1975).
- A paternalistic, jargon saturated, and sometimes overbearing way of dealing with parents of handicapped children and with students themselves.
- A linear and centralized decision model for allocation of resources to meet individual student needs.
- A data base for determining student needs and for allocating resources which misuses and overuses norm referenced, culturally based tests and sociodemographic data.
- Lack of organizational checks and balances against the poorly considered and sometimes capricious student related placement decisions made by individual regular or special education school staff.
- Tacit organizational and community approval of waiting lists for evaluation services and for placement openings.
- Poorly defined and conducted methods for intra- or interstaff communication, resource sharing, assignment of responsibility, and for general case management and coordination.
- Excessive use of staff time and placement resources on diagnostic study and on selection-rejection decisions, with little time spent on individualized program planning.
- Overdependence on use of pernicious labels and classification systems to justify provision of services.
- Limited commitment of human and material resources to the assessment and placement function and process.
- Lack of formal policy to govern and guide the referral and placement process, along with poorly defined processes and procedures.

Obviously not every school system operates a referral and placement system characterized by all of these ills, but these characteristics in major part still exemplify most special education school referral and placement systems. These characteristics are clearly a part of our history and current practice. Many schools have not yet begun to heed the message that referral and placement systems described by these characteristics must be renewed. Failure to do so places the school board and its practitioners not only out of step with their moral and ethical responsibility, but also with responsibilities defined in case law and, in many cases, in statutory law.

THE SYSTEM IN OPERATION

How do most placement systems operate? If one were to analyze several systems over the past few years, a general composite of the referral and placement process would emerge.

The Red Flag Component

First, the regular class teacher identifies a student with a problem and generally sends in a "referral form" for testing. This is the regular class red flag component. Within this component the regular class teacher's primary responsibility is to determine that a problem exists and to complete a referral form requesting further testing.

Typically, this form only requires data available in the student's cumulative folder, some open ended comments, and a signature. Comments recorded on the referral form are usually quite general (Alan can't learn, or Alan can't keep up with the class, or Alan doesn't seem to like school, or Alan is failing in all his work, etc.). The comments are based on the feelings of the teacher rather than on systematic observation and recorded data on specific performance tasks.

By making this rather simple step, the teacher is generally divested of further major responsibility for ensuring improved programing for the student in question. By and large, the teacher conducts business as usual, and the student receives few program modifications while evaluation is pending. In a sense, the teacher shifts the burden of responsibility by making the referral, and the student goes into an educational holding pattern pending "expert" evaluation.

Request for Testing Component

The second step in the typical referral process is the transmittal of the teacher referral for testing from the school principal to the special education department or to the school psychological services unit, depending on the organization of the particular school district. In most cases, limited attempts are made by the school principal either to validate the referring teacher's notions about the student in question, or to attempt to provide modification and/or instructional improvement within the scope of the general education resources at the immediate command of the principal.

Within this type of referral system the principal, in many cases, is primarily a traffic manager for the flow of referrals from teachers to special education for securing psychological and/or other special education services. Although one can think of many individual principals who at this point in the referral system exercise major creativity in attempting to program or reprogram for the individual within the limits of general education resources and staff, there are many who do not do so for whatever reason.

Psychological Testing Component

The third step in the typical referral process is the psychological evaluation. Historically, both by statutory requirements and by precedence, the individual psychological examination, administered by a certified school psychometrist or psychologist, has been the gatekeeping process for entry into most types of special education. Some type of informed clinical authorization from one generally external to the referring school and from someone considered as an expert is usually required.

This step in the typical referral process has been one of the major problems in delivering school services, however defined, to handicapped children. First, there are too few trained school psychologists available to conduct the number of individual psychological examinations required by the number of referrals made by teachers. Second, after what is typically a wait of many months and sometimes a year or more, the school psychologist will complete the examination and send a report of the findings back to the referring school.

The psychological report, in its implication for day to day instruction and case management of the student in question, typically holds little more than the information already prepared and presented by the local school personnel. Rarely will the school psychologist say there is *not* a problem if the school personnel say there *is* a problem. Also, this type of referral operation places some pressure on the school psychologist to make a certification or at least a clinical judgment as to whether or not this child is handicapped, to assign some type of category or label to that handicap, and to recommend a placement. Deliberate and prospective instructional strategies or classroom techniques are rarely suggested.

The principal outcomes of the individual psychological examination report are the certification that there is a problem with the learning and/or adjustment of the student in question, and the assignment of a particular categorical label or classification to this problem.

This step in the process, culminated by the report of an individual psychological examination, is of limited utility in the process of improving instruction for individual handicapped students, and it represents a major bottleneck in the delivery of services for students with learning and/or adjustment difficulties. It simply takes too long to obtain the psychological examination; few persons from the referring school make any program modifications or changes during the waiting period; and the information eventually gained is generally lacking in daily utility. Furthermore, this step heavily conditions and limits options for next steps.

Since the modal response from the school psychologist has been to agree that there is a problem, that the problem can be categorized and classified as some type of handicapping condition, and that a special class for the educable mentally retarded (or some other service or category) is probably indicated, the only historically appropriate response is to request a special education placement. After all, as many classroom teachers have said, "Regular class teachers are not skilled to teach retarded (brain injured, learning disabled, etc.) children!"

From the time of certification by a competent expert that the child is handicapped and that special education placement is indicated, the expectations of the classroom teacher and principal that they can effectively design and carry out instruction for the student in question are seriously lowered. Their energies and efforts are generally focused on the next step: securing the recommended special education services from the district special education department.

Referral for Direct Services Component

The fourth step in the process is the referral to the special education department for some type of program placement. The referring school will, by various means, collect data and complete forms as required by the department, will include the school psychologist's report, and will transmit the data on a standard referral form to the special education department. Again, the type of information requested of the school leans heavily on social, demographic, and norm referenced data.

Typically, as the discussion on step 6 will indicate, all special education programs and services are operating at or over capacity, and the school's request is added to the waiting list for similar services. Under this system, an aggressive and/or influential or persistent school principal or parent can, by applying pressure, cause a placement to be made or a service assigned. A school which waits patiently may wait, and wait, and wait. Once again the process of meeting a student's special educational needs has developed rigor mortis.

What else can be done? The teacher has identified a student in need of more than she/he can provide and has taken the appropriate steps to refer the child for a diagnostic study. The principal has affirmed the teacher's judgment, has authorized the diagnostic study referral, and has sent it to the appropriate place. The psychologist has seen and tested the student and has written a report and transmitted it to the school principal. The principal has completed another referral, this time for a specific special education placement or service, and the referral has been forwarded to the special education department.

Validating the Referral Component

The fifth step, that of determining the validity of the school's referral for special education service and assigning services or placement to the student, can also be a protracted one.

If the school psychologist has tested the student and has recommended some type of special education placement or service, the student is almost certain to be declared eligible for service by the director of special education. With this declaration of eligibility, in most school systems the student becomes in major part the responsibility of the special education department. If the department is unable to deliver the expected service, they earn the responsibility for the student's continued failure.

Although the student generally remains in the regular classroom and his/her teacher has day to day responsibility, the burden of accountability rests with the special education department. They are the ones who are not delivering the service, while all others—teacher, principal, psychologist—have done all that was expected of them.

The Waiting List Component

The sixth and last step in the referral process, placing the request on a waiting list, takes place only if there are no services or placement available. As previously noted, this is a highly probable event, since the number of referrals for special education is usually at least twice as great as the available service openings.

When the student is placed on a waiting list, several things occur. By taking the only action available to them, the special education department has also, in part, shifted the accountability burden to someone else. If the student is on a waiting list, and if the department has formally requested additional monies for additional program capacity, then the burden is in major part shifted to the superintendent.

If the superintendent has requested additional services for special education from the board of education and the board has not approved the request, then the board becomes accountable. While there is now some precedent for holding individual board members responsible for their decisions, it is still difficult to hold a board of education accountable except at the polls. As a result, this type of referral system is generally without accountability. The failure to provide some type of needed special education services rests with no one individual, but is diffused throughout the organization.

In this type of linear referral system, even though everyone does what is expected of them, students with major learning or adjustment problems or other handicaps may not receive the necessary program modifications or special services.

Obviously, there are many variations on this referral and placement system theme in school districts across the country. There are also many school districts which are making serious attempts to renew their referral and placement systems. However, the modal response is still to establish and maintain systems which (a) have linear decision making processes, (b) contribute to excessive labeling and classification of students, (c) reinforce the teacher in his/her expectation that she/he cannot teach the handicapped, (d) stimulate referrals to specialized settings and diminish the responsiveness and coping power of the regular system, (e) result in a static programing condition for the student, (f) provide for little parent input and involvement, (g) neglect to provide for periodic reevaluations, and (h) diffuse accountability.

THE POLICY RESPONSE

What has been the policy response to the inadequacies and inequities of this type of student related decision system? Frankly, although there have been and are a few professional special educators speaking out on related issues, the courts were the major precipitators of the current policy response. The equal right of all handicapped persons to a free public education, the right of parents and students to procedural safeguards guaranteed by the Constitution, and the right of students to the least restrictive placement possible have all been affirmed by many court decisions, including *PARC v. Commonwealth of Pennsylvania* (334 F. Supp. 1257 [E.D. Pa., 1971] and 343 F. Supp. 279 [E.D. Pa., 1972], Consent Agreement) and *Mills v. Board of Education of the District of Columbia* (348 F. Supp. 866 [DDC, 1972]). In addition, the right of students to nondiscriminatory testing processes and procedures was affirmed in *Larry P. v. Riles* (343 F. Supp. 1306 [N.D. Cal., 1972]) and *Diana v. State Board of Education* (37 RFP [N.D. Cal., January 7, 1970]).

Following these and other court cases, federal and state governments have begun to act. Congress, in its amendments to P.L. 93–380, required states desiring to make use of federal monies for education of the handicapped to provide due process for parents, to provide full service, to ensure culture fair testing, and to meet the requirements of the doctrine of least restrictive alternative. US Office of Education guidelines detail implementation of these amendments. In addition, the US Office of Civil Rights has recently issued a directive that schools shall provide for education in the least restrictive alternative and should drastically reduce the use of special segregated classes.

Several states have also recently modified their statutes related to special education and now require full service, due process, nondiscriminatory testing, and application of the doctrine of least restrictive alternative. Among these are North Carolina, Massachusetts, and Wisconsin.

There is, then, strong legitimation and incentive for schools to renew existing referral and placement systems. A strong superordinate policy posture clearly exists. It is no longer appropriate or legal to deny or overlook the right of parents to be involved in the decision making process, to place students in highly restrictive environments without prior documented experience in less restrictive environments, to use

Figure 1

Action Checklist:
Policy Requirements for Renewing
Special Education Placement Decision Systems

Action	*Yes*	*No*	*In process*	*Implementation timeline*	*Implementation obstacles*
We have adopted a formal school district policy affirming the right of all handicapped school age persons to a free public education.					
We have adopted a formal school district policy directing that special education programs will be organized and delivered consistent with an alternatives or continuum model.					
We have adopted a formal school district policy that every effort will be made by all school personnel to deliver instruction and services without using categorical labels for classifying either students or programs.					
We have adopted a formal school district policy affirming the right of parents and students to be involved in the total problem identification, assessment, placement, and program planning process.					
We have adopted a formal school district policy stipulating that all special education placements and changes in placement will be made through either informed parent consent or formal due process procedures.					
We have adopted a formal school district policy which affirms the right of each student to the most normalized or least restrictive educational placement.					
We have adopted a formal school district policy which encourages use of domain or criterion referenced testing and assessment instruments and procedures, and which constrains use of norm referenced data except where clearly useful in individual program planning.					

Additional Information/Data:

Figure 2

Action Checklist:
Process and Procedural Requirements for Renewing
Special Education Placement Decision Systems

Action	*Yes*	*No*	*In process*	*Implementation timeline*	*Implementation obstacles*
We have established written guidelines/directives for local school regular and special education personnel on parental/student involvement procedures and processes, and these guidelines cover the entire spectrum of the decision and placement process.					
We have included in these guidelines a written process and specific written procedures for obtaining informed parental consent on placement decisions and for ensuring that procedural due process guarantees are provided if parental consent is not obtained.					
We have established interdisciplinary student support teams in each local school building for the purpose of advising on individual program planning and on use of local school based placement resources. These teams include as team members the parent and the regular class teacher.					

We have developed written guidelines for the operation of interdisciplinary student support teams, and these guidelines have been disseminated to principals and other key building personnel.

We have designed and implemented inservice training for interdisciplinary student support teams.

We have developed referral instruments and decision processes which include data on observable classroom performance, and this data is collected and recorded in some standard and systematic manner.

We have developed an individual program planning or diagnostic-prescriptive process which always results in measurable individual written program plans/prescriptions, and which always provides for periodic, defined reassessment points.

We have established a centrally governed process and specific procedures designed to determine whether referrals for out-of-mainstream or more restrictive placements are based on substantive, documented rationale and data, and that all other options have been tried.

Additional Information/Data:

irrelevant and sometimes discriminatory data in making referral and placement decisions, or to deny services where they are clearly needed.

RENEWAL AT THE LOCAL SCHOOL DISTRICT LEVEL

Local school districts will have to initiate immediate action targeted on renewing their referral and placement decision systems. The type and extent of action or response each district will need to make will obviously be determined by several variables, including the type of system now in operation and the degree to which state statutes and regulations require anachronistic placement systems. However, some action will need to be taken by all school systems.

What are some actions that need to be taken? Are there some general requirements or criteria that need to be addressed? Are there any existing referral and placement systems which address these criteria? What actions by local school districts will be necessary?

Criteria for Renewal

An assessment of the current system for referral and placement will need to be made, including an analysis of the degree to which the system does or does not meet sound criteria for an effective referral and placement decision system. Based on court action and professional opinion, several criteria are suggested:

- The parents and/or student must be involved in all aspects of the assessment and program planning decision process.
- The responsibility of local school staff for serving most of the handicapped in the local school should be affirmed
- Compliance with the doctrine of least restrictive alternative must be insured.
- Decisions about placement and management of handicapped students should be made on a team basis rather than on an individual basis. These teams should always include as participants the referring teacher(s) and the parent.
- Periodic reevaluations should be an integral component of the system.
- Performance based culture fair assessment systems must be used, and use of chemical labels or categorical classification systems should be avoided.
- Accountability for action and outcome at all stages of the process must be clearly specified.
- Response time between initial teacher referral and completion of necessary assessments should be no more than two weeks. No more than two weeks should elapse between completion of the assessment and actual delivery of some type of service or implementation of an individualized program plan. In other words, students who have been identified as in need of modified programs and/or extra services should be in a "holding pattern" for no more than an absolute maximum of four weeks.
- A defined administrative approval process should be available for parents and for school staff.
- Due process procedures must be afforded the parent or surrogate parent if informed parental consent can not be obtained and the school intends to proceed with a special education placement.
- The referral and placement system should be based on written policy, processes, and procedures, and these should be evaluated at least annually to assess continued relevance and utility.

Recommended Actions: Policy

In assessing and using this list of important criteria, in adding others as appropriate, and in planning specific actions, it might be useful for schools to categorize the necessary actions into clusters. For example, renewal of a special education referral and placement system will require action in several areas: policy, process/procedure, and programming.

Several suggested policy actions are presented in Figure 1. This checklist can be used as an action needs assessment in the policy area. It lists policy actions considered by this author to be a minimum policy response.

In reviewing special education referral and placement systems, it is not sufficient merely to discuss important policy issues. These issues must be affirmatively translated into policy statements, and they must be adopted by the local board of education. In this respect, every *no* or *in process* response on the policy action checklist should be followed by a timeline for implementation and a list of obstacles which may need to be prospectively addressed.

One should not consider avoiding this policy action step on the grounds that sufficient policy

Figure 3

Action Checklist:
Programing Actions Necessary to Facilitate Renewal of Special Education Decision Systems

Action	Yes	No	In process	Implementation timeline	Implementation obstacles
We have established an operational least restrictive alternate program delivery system based primarily on a noncategorical level of service or continuum of services model.					
We have established alternatives to special class or special school placements including (a) training and consultation for regular class teachers and principals, (b) resource and tutorial services, (c) itinerant services, and (d) part time special class services. These alternatives are available to all elementary and secondary schools.					
We have sufficient placement openings for more seriously handicapped students in need of special class, special day school, or other more restrictive placement options, and we have eliminated waiting lists for these more restrictive services.					

Additional Information/Data:

exists at the state and/or federal level. The extensive changes required in local district operations are best preceded by policy discussion and resolution at the local level, as there are many educators in every school district who are content with the present system and who will, in either overt or covert fashion, reject or undermine the effort. This is not recorded as an indictment of educators, but simply as a fact. There will be individuals who resist the changes required to implement a philosophically relevant and legally sound referral and placement decision system.

Supportive policy at the federal and state level is certainly helpful and will facilitate approval of similar policies at the local level. However, there can be no substitute for concerted policy action at the local level.

Recommended Actions: Policy and Procedure

Another step in the referral and placement system renewal process is the translation of policy into written and legitimated process and procedure. Written processes and procedures create the specific operational format for guidance and governance of significant school persons and for the implementation of school policy. Figure 2 is a partial list of process and procedural actions required to implement the policy actions outlined in Figure 1.

The process and procedural actions suggested in Figure 2 will, if completed, provide daily guidelines for parent and/or student involvement in the entire decision and placement process, for application of constitutional safeguards, for establishment and governance of interdisciplinary decision teams, and for an appropriate individual program planning process. Obviously, not all of the procedural and process details necessary for designing and conducting a modern special education referral and placement system are included in Figure 2; however, it does outline most of the critically important process and procedure elements.

Recommended Actions: Programing

The degree to which the intent of policy is carried out is highly contingent on well defined, inclusive, and legitimated processes and procedures. The degree to which both policy and process procedures are effective will depend in major part on the availability of flexible, complete programing capability. Clearly, much can be accomplished by the impact of sound policy, process, and procedure on the degree to which existing general education resources are used effectively, but many students will require expanded special education support programs.

This is not to say that one should avoid renewal of the policy, process, and procedural aspects of the referral and placement system until such time as extensive special education program alternatives are available. On the contrary, sound policy, process, and procedure will stimulate the development of program alternatives. However, actions which lead to expansion and alteration of programing capability can and should proceed concurrent with development of policy and procedure. Several such programing actions are suggested in Figure 3.

A SUGGESTED MODEL

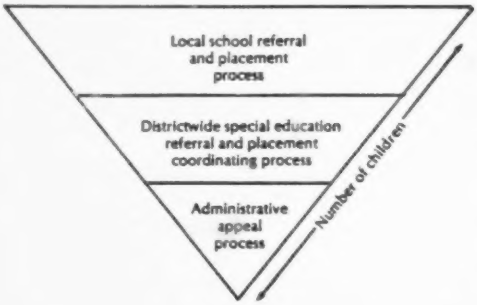
A model referral and placement system which incorporates most of the previously specified criteria has been field tested and implemented in the Minneapolis public schools. While space limitations do not permit a detailed exploration of this model, an overview of the primary components of the model is presented.

Local School Referral and Placement Process

Figure 4 represents three independent but interrelated processes. The first component, the local school referral and placement process, is the cornerstone of a total system designed to decentralize the placement decision process, to involve the parents and/or student, to provide case management accountability and appeal tracks for staff and parents, and to implement

Figure 4

Model Referral System Components


Local school referral and placement process
Districtwide special education referral and placement coordinating process
Administrative appeal process
Number of children

the doctrine of least restrictive alternative. As Figure 4 depicts, a substantial number of special education referral and placement actions and decisions should be made at the local level. The principal and his/her staff are in a central position in this referral system and are, in fact, required to make use of all building based regular and special education resources before referring the student for a special class or other more restrictive placement.

The principal ingredient in this process is the local school student support team. This team, composed of the principal or assistant principal, the regular class (referring) teacher, the special education resource teacher, the parent and/or student, the school social worker and school psychologist if available, and other ad hoc members as deemed appropriate, screens, reviews, and makes recommendations to the principal on all building referrals for specialized assistance.

Specifically, this building team and the principal have the authority to place students within any building based special education resource room or mainstream program without authorization from the special education central office, assuming that a team process is used, that state regulations are adhered to, and that established district policy is not violated. Under this type of system, the principal and his/her immediate staff determine priorities for use of building based resources and are accountable for local school placement decisions.

As an aid to local school personnel (although not always perceived as an aid), specialized data collection forms and procedures, guidelines for student support team operation, and technical assistance systems have been developed and are in use in the Minneapolis public school system.

Within this type of system, teacher and principal energy is focused on individual program planning at the building level rather than on attempts to get the student tested and/or placed in some program or service external to the referring school. In fact, no formal individual psychological examination is necessary or required for most building based, part time special education services or placements. Referrals for placements out of the local school or for special classes are not honored until sufficient documentation is available that the local school has used its best efforts and resources. This is determined at the next level in the referral system, the districtwide special education referral and placement coordinating process.

Districtwide Special Education Referral and Placement Coordinating Process

This level of the model referral and placement system (see Figure 4) is designed to assist the director of special education, or other designated administrator, in his/her responsibility for governing assignment of handicapped students to systemwide, more restrictive program placements. It will also assist local schools in finding appropriate specialized placements for students whose needs clearly exceed the programing ability of the local elementary or secondary school.

This process is implemented by a standing committee composed of two, three or four special educators who perform this function full time, plus ad hoc committee members. This committee, the districtwide special education referral and placement coordinating committee, has the difficult role of helping districts locate placement opportunities in districtwide special education programs and of insuring that the local referring school has properly used and exhausted all its internal flexibility and resources. In other words, the central coordinating committee's role is to determine if the intent of the doctrine of least restrictive alternative has been met in each case and appropriately documented, to determine if procedural safeguards have been adhered to, and if so, to assist in locating a special program placement.

Members of the special districtwide committee, the parent and/or student, representatives of the local school, and often other ad hoc members asked to attend by the parents or the school, meet in a team format to discuss the child's needs, to hear from all who wish to register their thoughts, and to develop an individual program plan. This team or committee meeting is not a due process hearing, but rather what might be called a common sense internal mechanism for involving parents and for individual program planning at a districtwide rather than local school level. The coordinating committee is advisory to the director of special education and is the primary internal means of enforcing the right of individual students to the least restrictive placement possible. Again, its function is not only regulatory; it also has the responsibility to act as the one point of referral for all students who clearly need more specialized assistance than the local school can provide.

The centralized referral and coordinating process should be staffed to deal with a small number of the total district referral and placement transactions (see Figure 4) and should process referrals for students only after the local school referral and placement process has been conducted. When a referral is made, however, the appropriateness of the referral should be judged, and, if the referral is appropriate, the team meeting and individual program plan should be developed within a maximum 10 day turnaround time. If this central process is not to become an individual program planning bottleneck, maximum turnaround time must be specified.

The central team and the total districtwide referral and placement coordinating process may not always be graciously accepted or positively referenced by principals and other local school building staff. This process must function as a check and balance system. Where the local school has made limited attempts to develop and implement a school based individual program plan, and has not made flexible use of local school resources to develop a less restrictive alternative, the central coordinating team has the responsibility to ask more of the local school. Thus, there are times when local schools will be sensitive to being told what to do and will react quite negatively.

In Minneapolis, for example, there have been several isolated individual and small group attempts by principals and others to overturn or dilute the central coordinating process for governing access to more restrictive placements. By and large, however, most school principals and school support staff recognize that this central process both helps protect them from legal action and facilitates individual program planning and parent involvement for students who require more restrictive program alternatives such as special schools or classes.

There are circumstances where a central checks and balances process of this type is not effective. This occurs when there is (a) lack of effort at implementing the local school portion of the referral and placement process, (b) too large a district or intermediate unit for one central coordinating committee, (c) lack of firm administrative support, or (d) lack of program options for more restrictive placements.

A lack of local school effort will be reflected in a referral flow too large for the central coordinating process to handle. The process will become a bottleneck with waiting lists for processing. This may happen early in the development of a model referral and placement system, but if it is allowed to continue, it will negate the purposes for which the system was established. Training and development of local school student support teams, expansion of local school based special education resources, orientation for principals and other support staff, and, frankly, a hard-nosed stand on inappropriate referrals will all help maintain responsiveness at this level of the total referral and placement process.

District size may also result in a referral flow too large to manage. The Minneapolis public school system, with over 50,000 students and some 100 elementary and secondary schools, manages with one central referral and placement coordinating committee. Larger districts may need additional central committees. However, every effort should be made to minimize the number of central checks and balances committees, as a problem of intercommittee reliability will generally surface. In this case, a referral for a more restrictive placement to committee A might result in one outcome, while the same referral to committee B would produce another outcome. Where multiple committees or teams have the responsibility for insuring that the doctrine of least restrictive alternative is enforced, and for accessing the several program resources for students with more severe and/or complex needs, care must be taken to ensure consistency of operation and response.

Lack of firm administrative support will result in a paper process. The outcome of this will be to maintain the status quo; that is, the local school will not develop its coping power to accommodate handicapped persons, and too many students will be referred to and placed in special classes. If, for example, the central committee recommends that the requested placement for a special school or class is clearly not the least restrictive alternative for meeting the student's needs, and the student is placed anyway because of political pressure from either school personnel or parents, then the intent of this process will have been obviated.

Obviously, there is room for negotiation within the process. There must be flexibility, since both local school and central committee personnel are dealing in the realm of "best guesses." However, flagrant circumventing of the process or lack of support for its findings will destroy the process.

Lack of program options will seriously restrict the ability of the central referral and placement coordinating committee to assist local schools access special classes, schools, or more restrictive community placements. Obviously, expansion of programs will be of assistance.

This last reason for dysfunction in the central referral and placement coordinating process, as well as the need to resolve honest differences of opinion, requires attention beyond the resources and responsibility of the central coordinating committee. This leads to the third and final level of the model referral and placement process, the administrative appeal process.

Administrative Appeal Process

If the previously described processes are functioning as required, the total number of special education referrals and placements which in any one school district or cooperative need to be resolved by administrative appeal should be minimal. The local school referral and placement process and the centralized referral and placement coordinating process should handle as a matter of course the vast majority of referral and placement traffic.

However, there will be cases which require resolution by administrative action at the level of the director of special education or his/her superordinate. In Minneapolis, administrative appeals have been used to resolve situations where there is no agreement, or where there are insufficient resources to implement an agreed on individual program plan.

The former instance—no agreement—occurs when the school principal disagrees with the findings of the central coordinating committee, or when the parent or surrogate parent disagrees with the individual program plan agreed to by the principal and the central committee. In these cases, either the principal or parent may appeal in writing to the director of special education. If the potential solution or the nature of the situation requires administrative action by other administrators, the director will involve them in the appeal. If, for example, the recommended plan of action is to transfer a student from one school to another, the case will be brought to the attention of the principal of the potential receiving school and the area superintendent. The area superintendent or other central office administrator would have to resolve disagreements voiced by either principal.

As a case in point, one such instance occurred recently in the Minneapolis program. Principal A had requested removal of a student with reported psychosocial adjustment difficulties from the regular school to a special segregated school for such students. After a central coordinating committee decision to recommend an interschool transfer, the principal became quite agitated and appealed to the director both in person and in writing. The director, in reviewing the facts at hand, agreed that the student should remain in a less restrictive environment than that proposed by principal A and supported the recommendation of the central coordinating committee for an interschool transfer to a school with a different school climate. Subsequently, principal B of the proposed receiving school agreed to take the student on a trial basis.

Principal A, however, felt so strongly that this student did not belong in a regular school that he pressured principal B not to take the student. At that point, principal B hesitated to take the student in light of the adamant stand of one of his/her colleagues and demurred.

The director of special education referred the matter to the area superintendent for action, and the area superintendent ordered the student to be placed in principal B's school. Interestingly, the "best guess" of the central coordinating committee was in this case accurate, as the student made a very satisfactory adjustment in the new school. To this date, it is difficult for principal A to be dispassionate about the "special education department's" central coordinating process and committee.

Disagreements raised by parents also must be resolved by administrative appeal. Parent-school disagreements do not and should not always require the invoking of full due process procedures. Most differences or disagreements can, in our experience with this type of referral system, be resolved internally through open dialogue at one level or another of the total referral process.

If not resolvable at the administrative appeal level, however, and if the school district intends to implement the proposed individual program plan in spite of the parents' objections, then formal due process procedures must be used. Every effort at the administrative level should be devoted to obtaining informed parental consent to a plan of action acceptable to both parent and school. Again, experience with this model system indicates that few formal administrative appeals relate to parent disagreement. Most appeals are made because of differences of opinion between the school and the central coordinating committee or because of a lack of available services.

Lack of available services or placement openings necessary to carry out an agreed on individual program plan is also a reason for administrative appeal. In this instance, the chairperson/coordinator of the central committee files the appeal with the director. The role of the director in this case is to approve the program plan and to obtain the necessary resources. Additional resources may be obtained either by reorganization/reallocation of resources within the director's control, or by special request to superordinate authority.

In the Minneapolis experience, there have been few cases where the necessary resources, or at least a close approximation, were not obtained. Usually, by the time a referral gets to this level in the total referral and placement system, there is heavy documentation not only of student need but also of past program efforts. Resources are more readily available to meet the special needs of complex cases within this type of referral operation than they are for the so-called waiting list generated by typical referral operations. A decision by administration not to grant the required resources is quite visible within this model system.

THE DOCTRINE OF LEAST RESTRICTIVE ALTERNATIVE

A brief word about this doctrine is important if one is to understand one major legal basis for renewing special education referral and placement systems. Any referral and placement system designed and implemented must be in accord with the requirements of this doctrine.

The doctrine of least restrictive alternative, typically applied by the courts in non-education-related civil cases, has recently been applied and upheld as a defense against arbitrary and capricious placement and treatment practices. The doctrine is particularly germane to the development of model referral systems and practices, since districts must establish procedures to ensure that when a student is placed or when a treatment is applied, that placement or treatment is the least restrictive necessary.

Johnson (1975), in discussing the doctrine as applied to education, stated:

> In essence, this doctrine provides that, when government pursues a legitimate goal that may involve the restricting of fundamental liberty, it must do so using the least restrictive alternative available. Applied to education, courts have ruled in principle that special education systems or practices are inappropriate if they remove children from their expanded peer group without benefit of constitutional safeguards. Placement in special environments for educational purposes can, without appropriate safeguards, become a restriction of fundamental liberties.
>
> It is required, then, that substantive efforts be made by educators to maintain handicapped children with their peers in a regular education setting, and that the state (as represented by individual school districts) bear the burden of proof when making placements or when applying treatments which involve partial or complete removal of handicapped children from their normal peers.
>
> This doctrine represents, for handicapped children, the right to be educated in the regular class, however defined, unless clear evidence is available that partial or complete removal is necessary. Factors idiosyncratic to school districts (such as organizational arrangements, technological differences in delivery systems, agency jurisdictional problems, and/or lack of adequate local, state, or federal financial support) may not be considered as reasons for abrogating the right of an individual child to the least restrictive alternative necessary to meet his/her unique educational needs.
>
> The doctrine of least restrictive alternatives has been a primary reference in court decisions involving the right of handicapped children to both treatment and education. Among these cases are *Mills v. Board of Education, PARC v. Commonwealth of Pennsylvania, Wyatt v. Stickney....*

A more complete discussion of this doctrine can be found in an article entitled "The Doctrine of the Least Restrictive Alternative" by Robert Burgdorf, Jr. (1975).

Clearly, this doctrine must be complied with by school personnel in the referral and placement of handicapped youth. The model referral and placement process described in this chapter is designed to ensure that each student indeed has the right to the least restrictive placement possible. Of utmost importance is that placements under this doctrine be made with absolute consideration of each child's needs. It is as inappropriate to misplace a handicapped child in need of a more restrictive program in one with less restrictiveness as it is to place a handicapped child in need of a less restrictive program in one which imposes unnecessary restrictions.

CONCLUDING REMARKS

There is both professional and legal acclaim for the need to review public school special education referral and placement practices. Current practices are generally not in accord with trends to avoid stigmatizing labels, to maintain handicapped children in the regular classroom, to avoid simple classification schemes based primarily on nonreferenced data, and to substantively involve parents and students in the decision making process. Also, most existing referral and placement decision systems do not comply with the legal requirements of due process, nondiscriminatory testing, and the doctrine of least restrictive alternative.

Sufficient policy certainly exists at the federal level, in recent court decisions, and within legislative enactments of many states. School districts, however, generally have not developed an appropriate policy response, and need to do so if renewal of referral and placement systems and practices is to be effective.

At the level of actual practice, a model special education referral and placement system has been developed and is in operation in the Minneapolis public schools. This model system, which is composed of a local school based referral process, a centralized coordinating function for complex cases, and an administrative appeal process, is designed to ensure the right of each student to the least restrictive placement possible. The decision making process is dedicated to that end.

School systems must act to renew their special education placement systems. Sufficient need, legitimation, technology, and model practices now exist. Further delay will represent an abrogation of professional and legal responsibility. More importantly, it will deny appropriate meaningful support to many students who are being served poorly or not at all, who are on waiting lists, or who have indeed been or may be placed without benefit of various legal safeguards.

REFERENCES

Burgdorf, R. L., Jr. The doctrine of the least restrictive alternative. In R. A. Johnson et al. (Eds.), *Handicapped youth and the mainstream educator* (Vol. 4, The Leadership Series in Special Education). Minneapolis: University of Minnesota, A.U. Library Service, 1975.

Johnson, R. A. Model for alternative programming: A perspective. In E. Meyen et al. (Eds.), *Alternatives for teaching exceptional children*. Denver: Love Publishing Co., 1975.

Excerpts from Selected Right to Education Court Orders

☐ The following are excerpted from the final orders in four key right to education cases: *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 1971; *Mills v. the Board of Education of the District of Columbia*, 1972; *Maryland Association for Retarded Children v. the State of Maryland*, 1974; and *In the Interest of G. H., A Child*, 1974.

PENNSYLVANIA ASSOCIATION FOR RETARDED CHILDREN, NANCY BETH BOWMAN, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, DAVID H. KURTZMAN, et al.

Civil Action No.
71–42

ORDER, INJUNCTION AND CONSENT AGREEMENT

AND NOW, this 7th day of October, 1971, the parties having consented through their counsel to certain findings and conclusions and to the relief to be provided to the named plaintiffs and to the members of their class, the provisions of the Consent Agreement between the parties set out below are hereby approved and adopted and it is hereby so ORDERED.

And for the reasons set out below it is ORDERED that defendants the Commonwealth of Pennsylvania, the Secretary of the Department of Education, the State Board of Education, the Secretary of the Department of Public Welfare, the named defendant school districts and intermediate units and each of the School Districts and Intermediate Units in the Commonwealth of Pennsylvania, their officers, employees, agents and successors be and they hereby are enjoined as follows:

(a) from applying Section 1304 of the Public School Code of 1949, 24 Purd. Stat. Sec. 1304, so as to postpone or in anyway to deny to any mentally retarded child access to a free public program of education and training;

(b) from applying Section 1326 or Section 1330(2) of the School Code of 1949, 24 Purd. Stat. Secs. 13–1326, 13–1330(2) so as to postpone, to terminate or in anyway to deny to any mentally retarded child access to a free public program of education and training;

(c) from applying Section 1371(1) of the School Code of 1949, 24 Purd. Stat. Sec. 13–1371(1) so as to deny to any mentally retarded child access to a free public program of education and training;

(d) from applying Section 1376 of the School Code of 1949, 24 Purd. Stat. Sec. 13–1376, so as to deny tuition or tuition and maintenance to any mentally retarded person except on the same terms as may be applied to other exceptional children, including brain damaged children generally;

(e) from denying homebound instruction under Section 1372(3) of the School Code of 1949, 24 Purd. Stat. Sec. 13–1372(3) to any mentally retarded child merely because no physical disability accompanies the retardation or because retardation is not a short-term disability;

(f) from applying Section 1375 of the School Code of 1949, 24 Purd. Stat. Sec. 13–1375, so as to deny to any mentally retarded child access to a free public program of education and training;

(g) to immediately re-evaluate the named plaintiffs, and to accord to each of them, as soon as possible but in no event later than October 13, 1971, access to a free public program of education and training appropriate to his learning capacities;

(h) to provide, as soon as possible but in no event later than September 1, 1972, to every retarded person between the ages of six and twenty-one years as of the date of this Order and thereafter, access to a free public program of education and training appropriate to his learning capacities;

(i) to provide, as soon as possible but in no event later than September 1, 1972, wherever defendants provide a pre-school program of education and training for children aged less than six years of age, access to a free public program of education and training appropriate to his learning capacities to every mentally retarded child of the same age.

The above Orders are entered as interim Orders only and without prejudice, pending notice, as described in Paragraph 3 below, to the class of plaintiffs and to the class of defendants determined in Paragraphs 1 and 2 below.

Any member of the classes so notified who may wish to be heard before permanent Orders are entered shall enter his appearance and file a written statement of objections with the Clerk of this Court on or before November 10, 1971. Any objections so entered will be heard by the Court at 10 o'clock on November 12, 1971.

S/ Judges Raymond J. Broderick
Arlin M. Adams
Thomas A. Masterson

CONSENT AGREEMENT

The Complaint in this action having been filed on January 7, 1971, alleging the unconstitutionality of certain Pennsylvania statutes and practices under the Equal Protection Clause of the Fourteenth Amendment and certain pendent claims; a three-judge court having been constituted, after motion, briefing and argument thereon, on May 26, 1971; an Order and Stipulation having been entered on June 18, 1971, requiring notice and due process hearing before the educational assignment of any retarded child may be changed; and evidence having been received at preliminary hearing on August 12, 1971;

Now, therefore, this 7th of October 1971, the parties being desirous of effecting an amicable settlement of this action, the parties by their counsel agree, subject to the approval and Order of this Court, as follows:

I.

1. This action may and hereby shall be maintained by plaintiffs as a class action on behalf of all mentally retarded persons, residents of the Commonwealth of Pennsylvania, who have been, are being, or may be denied access to a free public program of education and training while they are, or were, less than twenty-one years of age.

It is expressly understood, subject to the provisions of Paragraph 44 below, that the immediate relief hereinafter provided shall be provided to those persons less than twenty-one years of age as of the date of the Order of the Court herein.

2. This action may and hereby shall be maintained against defendant school districts and intermediate units as a class action against all of the School districts and Intermediate Units of the Commonwealth of Pennsylvania.

3. Pursuant to Rule 23, Fed. R. Civ. P., notice of the extent of the Consent Agreement and the proposed Order approving this Consent Agreement, in the form set out in Appendix A, shall be given as follows:

(a) to the class of defendants, by the Secretary of Education, by mailing immediately a copy of this proposed Order and Consent Agreement to the Superintendent and the Director of Special Education of each School District and Intermediate Unit in the Commonwealth of Pennsylvania;

(b) to the class of plaintiffs, (i) by the Pennsylvania Association for Retarded Children, by immediately mailing a copy of this proposed Order and Consent Agreement to each of its Chapters in fifty-four counties of Pennsylvania; (ii) by the Department of Justice, by causing an advertisement in the form set out in Appendix A, to be placed in one newspaper of general circulation in each County in the Commonwealth; and (iii) by delivery of a joint press release of the parties to the television and radio stations, newspapers, and wire service in the Commonwealth.

II.

4. Expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will

benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training.

5. The Commonwealth of Pennsylvania has undertaken to provide a free public education to all of its children between the ages of six and twenty-one years, and, even more specifically, has undertaken to provide education and training for all of its exceptional children.

6. Having undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training.

7. It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.

III.

Section 1304

. . . 10. The Attorney General of the Commonwealth of Pennsylvania (hereinafter "the Attorney General") agrees to issue an Opinion declaring that Section 1304 means *only* that a school district may refuse to accept into or to retain in the lowest grade of the *regular* primary school or the lowest *regular* primary class above the kindergarten level, any child who has not attained a mental age of five years.

11. The Attorney General of the Commonwealth of Pennsylvania shall issue an Opinion thus construing Section 1304, and the State Board of Education (hereinafter "the Board") shall issue regulations to implement said construction and to supersede Sections 5-200 of the Pupil Attendance Regulations, copies of which Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

12. The aforementioned Opinion and Regulations shall (a) provide for notice and an opportunity for a hearing as set out in this Court's Order of June 18, 1971, before a child's admission as a beginner in the lowest grade of a regular primary school, or the lowest regular primary class above kindergarten, may be postponed; (b) require the automatic re-evaluation every two years of any educational assignment other than to a regular class, and (c) provide for an annual re-evaluation at the request of the child's parent or guardian, and (d) provide upon each such re-evaluation for notice and an opportunity for a hearing as set out in this Court's Order of June 18, 1971.

13. The aforementioned Opinion and Regulations shall also require the timely placement of any child whose admission to regular primary school or to the lowest regular primary class above kindergarten is postponed, or who is not retained in such school or class, in a free public program of education and training pursuant to Sections 1371 through 1382 of the School Code of 1949, as amended 24 Purd. Stat. Sec. 13-1371 through Sec. 13-1382.

Section 1326

. . . 16. The Attorney General agrees to issue an Opinion declaring that Section 1326 means *only* that parents of a child have a compulsory duty while the child is between eight and seventeen years of age to assure his attendance in a program of education and training; and Section 1326 does not limit the ages between which a child must be granted access to a free, public program of education and training. Defendants are bound by Section 1301 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1301, to provide free public education to all children six to twenty-one years of age. In the event that a parent elects to exercise the right of a child six through eight years and/or seventeen through twenty-one years of age to a free public education, defendants may not deny such child access to a program of education and training. Furthermore, if a parent does not discharge the duty of compulsory attendance with regard to any mentally retarded child between eight and seventeen years of age, defendants must and shall take those steps necessary to compel the child's attendance pursuant to Section 1327 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1327, and related provisions of the School Code, and to the relevant regulations with regard to compulsory attendance promulgated by the Board.

17. The Attorney General shall issue an Opinion thus construing Section 1326, and re-

lated Sections, and the Board shall promulgate Regulations to implement said construction, copies of which Opinion and Regulations shall be filed with the Court and delivered to plaintiffs' counsel on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Section 1330(2)

. . . 19. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units, each of them, for themselves, their officers, employees, agents, and successors agree that they shall cease and desist from applying Section 1330(2) so as to terminate or in any way to deny access to a free public program of education and training to any mentally retarded child.

20. The Attorney General agrees to issue an Opinion declaring that Section 1330(2) means *only* that a parent may be excused from liability under the compulsory attendance provisions of the School Code when, with the approval of the local school board and the Secretary of Education and a finding by an approved clinic or public school psychologist or psychological examiner, the parent elects to withdraw the child from attendance. Section 1330(2) may not be invoked by defendants, contrary to the parents' wishes, to terminate or in any way to deny access to a free public program of education and training to any mentally retarded child. Furthermore, if a parent does not discharge the duty of compulsory attendance with regards to any mentally retarded child between eight and seventeen years of age, defendants must and shall take those steps necessary to compel the child's attendance pursuant to Section 1327 and related provisions of the School Code and to the relevant regulations with regard to compulsory attendance promulgated by the Board.

21. The Attorney General shall issue an Opinion so construing Section 1330(2) and related provisions and the Board shall promulgate Regulations to implement said construction and to supersede Section 5-400 of the Pupil Attendance Regulations, a copy of which Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiff on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Pre-School Education

22. Defendants, the Commonwealth of Pennsylvania, the Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, the Secretary of Public Welfare, each of them, for themselves, their officers, employees, agents and successors agree that they shall cease and desist from applying Section 1371(1) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1371(1) so as to deny access to a free public program of education and training to any mentally retarded child, and they further agree that wherever the Department of Education through its instrumentalities, the School Districts and Intermediate Units, or the Department of Public Welfare through any of its instrumentalities provides a pre-school program of education and training to children below the age of six, they shall also provide a program of education and training appropriate to their learning capacities to all retarded children of the same age.

24. The Attorney General agrees to issue an Opinion declaring that the phrase "children of school age" as used in Section 1371 means children aged six to twenty-one and also, whenever the Department of Education through any of its instrumentalities, the local School District, Intermediate Unit, or the Department of Public Welfare, through any of its instrumentalities, provides a pre-school program of education or training for children below the age of six, whether kindergarten or however so called, means all mentally retarded children who have reached the age less than six at which preschool programs are available to others.

25. The Attorney General shall issue an Opinion thus construing Section 1371 and the Board shall issue regulations to implement said construction, copies of which Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Tuition or Tuition and Maintenance

26. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Inter-

mediate Units in the Commonwealth of Pennsylvania, each of them, for themselves, their officers, employees, agents and successors agree that they shall cease and desist from applying Section 1376 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1376, so as to deny tuition or tuition and maintenance to any mentally retarded person.

27. The Attorney General agrees to issue an Opinion, and the Council of Basic Education of the State Board of Education agrees to promulgate Regulations, construing the term "brain damage" as used in Section 1376 and as defined in the Board's "Criteria for Approval . . . of Reimbursement" so as to include thereunder all mentally retarded persons, thereby making available to them tuition for day school and tuition and maintenance for residential school up to the maximum sum available for day school or residential school, whichever provides the more appropriate program of education and training. Copies of the aforesaid Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiff on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

28. Defendants may deny or withdraw payments of tuition or tuition and maintenance whenever the school district or intermediate unit in which a mentally retarded child resides provides a program of special education and training appropriate to the child's learning capacities into which the child may be placed.

29. The decision of defendants to deny or withdraw payments of tuition or tuition and maintenance shall be deemed a change in educational assignment as to which notice shall be given and an opportunity for a hearing afforded as set out in this Court's order of June 18, 1971.

Homebound Instruction

. . . 31. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, each of them, for themselves, their officials, employees, agents and successors agree that they shall cease and desist from denying homebound instruction under Section 1372(3) to mentally retarded children merely because no physical disability accompanies the retardation or because retardation is not a short-term disability.

32. The Attorney General agrees to issue an Opinion declaring that a mentally retarded child, whether or not physically disabled, may receive homebound instruction and the State Board of Education and/or the Secretary of Education agrees to promulgate revised Regulations and forms in accord therewith, superseding the "Homebound Instruction Manual" (1970) insofar as it concerns mentally retarded children.

33. The aforesaid Opinion and Regulations shall also provide:

(a) that homebound instruction is the least preferable of the programs of education and training administered by the Department of Education and a mentally retarded child shall not be assigned to it unless it is the program most appropriate to the child's capacities;

(b) that homebound instruction shall involve education and training for at least five hours a week;

(c) that an assignment to homebound instruction shall be re-evaluated not less than every three months, and notice of the evaluation and an opportunity for a hearing thereon shall be accorded to the parent or guardian, as set out in the Order of this Court dated June 18, 1971.

34. Copies of the aforementioned Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Section 1375

. . . 36. Defendants the Commonwealth of Pennsylvania, the Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, and the Secretary of Public Welfare, each of them, for themselves, their officers, employees, agents and successors agree that they shall cease and desist from applying Section 1375 so as to deny access to a free public program of education and training to any mentally retarded child.

37. The Attorney General agrees to issue an Opinion declaring that since all children are capable of benefiting from a program of education and training, Section 1375 means that insofar as the Department of Public Welfare is charged to "arrange for the care, training and

supervision" of a child certified to it, the Department of Public Welfare must provide a program of education and training appropriate to the capacities of that child.

38. The Attorney General agrees to issue an Opinion declaring that Section 1375 means that when it is found, on the recommendations of a public school psychologist and upon the approval of the local board of school directors and the Secretary of Education, as reviewed in the due process hearing as set out in the Order of this Court dated June 18, 1971, that a mentally retarded child would benefit more from placement in a program of education and training administered by the Department of Public Welfare than he would from any program of education and training administered by the Department of Education, he shall be certified to the Department of Public Welfare for placement in a program of education and training.

39. To assure that any program of education and training administered by the Department of Public Welfare shall provide education and training appropriate to a child's capacities the plan referred to in Paragraph 49 below shall specify, *inter alia*,

(a) the standards for hours of instruction, pupil-teacher ratios, curriculum, facilities, and teacher qualifications that shall be met in programs administered by the Department of Public Welfare;

(b) the standards which will qualify any mentally retarded person who completes a program administered by the Department of Public Welfare for a High School Certificate or a Certificate of Attendance as contemplated in Sections 8-132 and 8-133 of the Special Education Regulations; . . .

(d) that the Department of Education shall exercise the power under Section 1926 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 19-1926 to supervise the programs of education and training in all institutions wholly or partly supported by the Department of Public Welfare, and the procedures to be adopted therefor.

40. The Attorney General agrees to issue an Opinion so construing Section 1375 and the Board to promulgate Relugations implementing said construction, which Opinion and Regulations shall also provide:

(a) that the Secretary of Education shall be responsible for assuring that every mentally retarded child is placed in a program of education and training appropriate to his learning capacities, and to that end, by Rules of Procedure requiring that reports of the annual census and evaluation, under Section 1371(2) of the School Code of 1949, as amended, 24 Purd. Stat. 13-1371(2), be made to him, he shall be informed as to the identity, condition, and educational status of every mentally retarded child within the various school districts.

(b) that should it appear that the provisions of the School Code relating to the proper education and training of mentally retarded children have not been complied with or the needs of the mentally retarded child are not being adequately served in any program administered by the Department of Public Welfare, the Department of Education shall provide such education and training pursuant to Section 1372(5) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1372(5).

(c) that the same right to notice and an opportunity for a hearing as is set out in the Order of this Court of June 18, 1971, shall be accorded on any change in educational assignment among the programs of education and training administered by the Department of Public Welfare.

(d) that not less than every two years the assignment of any mentally retarded child to a program of education and training administered by the Department of Public Welfare shall be re-evaluated by the Department of Education and upon such re-evaluation, notice and an opportunity to be heard shall be accorded as set out in the Order of this Court, dated June 18, 1971.

40. Copies of the aforesaid Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

IV.

41. Each of the named plaintiffs shall be immediately re-evaluated by defendants and, as soon as possible, but in no event later than October 13, 1971, shall be accorded access to a free public program of education and training appropriate to his learning capacities.

42. Every retarded person between the ages of six and twenty-one years as of the date of this Order and thereafter shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than September 1, 1972.

43. Wherever defendants provide a preschool program of education and training for children less than six years of age, whether kindergarten or howsoever called, every mentally retarded child of the same age as of the date of this Order and hereafter shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than September 1, 1972.

44. The parties explicitly reserve their right to hearing and argument on the question of the obligation of defendants to accord compensatory educational opportunity to members of the plaintiff class of whatever age who were denied access to a free public program of education and training without notice and without a due process hearing while they were aged six years to twenty-one years, for a period equal to the period of such wrongful denial.

45. To implement the aforementioned relief and to assure that it is extended to all members of the class entitled to it, Dr. Herbert Goldstein and Dennis E. Haggerty, Esquire are appointed Masters for the purpose of overseeing a process of identification, evaluation, notification, and compliance hereinafter described.

46. Notice of this Order and the Order of June 18, 1971, in form to be agreed upon by counsel for the parties, shall be given by defendants to the parents and guardian of every mentally retarded person, and of every person thought by defendants to be mentally retarded, of the ages specified in Paragraphs 42 and 43 above, now resident in the Commonwealth of Pennsylvania, who while he was aged four years to twenty-one years was not accorded access to a free public program of education and training, whether as a result of exclusion, postponement, excusal, or in any other fashion, formal or informal.

47. Within thirty days of the date of this Order, defendants shall formulate and shall submit to the Masters for their approval a satisfactory plan to identify, locate, evaluate and give notice to all the persons described in the foregoing paragraph, and to identify all persons described in Paragraph 44, which plan shall include, but not be limited to, a search of the records of the local school districts, of the intermediate units, of County MH/MR units, of the State Schools and Hospitals, including the waiting lists for admission thereto, and of interim care facilities, and, to the extent necessary, publication in newspapers and the use of radio and television in a manner calculated to reach the persons described in the foregoing paragraph. A copy of the proposed plan shall be delivered to counsel for plaintiffs who shall be accorded a right to be heard thereon.

48. Within ninety days of the date of this Order, defendants shall identify and locate all persons described in paragraph 46 above, give them notice and provide for their evaluation, and shall report to the Masters the names, circumstances, the educational histories and the educational diagnosis of all persons so identified.

49. By February 1, 1972, defendants shall formulate and submit to the Masters for their approval a plan, to be effectuated by September 1, 1972, to commence or recommence a free public program of education and training for all mentally retarded persons described in Paragraph 46 above and aged between four and twenty-one years as of the date of this Order, and for all mentally retarded persons of such ages hereafter. The plan shall specify the range of programs of education and training, their kind and number, necessary to provide an appropriate program of education and training to all mentally retarded children, where they shall be conducted, arrangements for their financing, and, if additional teachers are found to be necessary, the plan shall specify recruitment, hiring, and training arrangements. The plan shall specify such additional standards and procedures, including but not limited to those specified in Paragraph 39 above, as may be consistent with this Order and necessary to its effectuation. A copy of the proposed plan will be delivered to counsel for plaintiffs who shall be accorded a right to be heard thereon.

50. If by September 1, 1972, any local school district or intermediate unit is not providing a free public education to all mentally retarded persons 4 to 21 years of age within its responsibility, the Secretary of Education, pursuant to Section 1372(5) of the Public School Code of 1949, 24 Purd. Stat. 1372(5) shall directly provide, maintain, administer, supervise, and operate programs for the education and training of these children.

51. The Masters shall hear any members of the plaintiff class who may be aggrieved in the implementation of this Order.

52. The Masters shall be compensated by defendants.

53. This Court shall retain jurisdiction of the matter until it has heard the final report of the Masters on or before October 15, 1972.

54. As used herein before the phrase "men-

tally retarded child" shall include, without limitation, any child who is mentally retarded within the definition of "mental retardation" set out in Section 4102 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. Sec. 4102, namely: "Mental Retardation means subaverage general intellectual functioning which originates during the developmental period and is associated with impairment of one or more of the following: (1) maturation, (2) learning and (3) social adjustment."

S/ J. Shane Creamer
Attorney General

Ed Weintraub
Deputy Attorney General
Attorneys for Defendants

Thomas K. Gilhool
Attorney for Plaintiffs

Acknowledged:

Dr. David H. Kurtzman
Secretary of Education

Dr. William F. Ohrtman
Director, Bureau of
Special Education

Mrs. Helene Wohlgemuth
Secretary of Public Welfare

Edward R. Goldman
Commissioner of Mental
Retardation

MILLS

v.

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA

348 F. Supp. 866
(D.D.C. 1972)

PLAINTIFFS ARE ENTITLED TO RELIEF

Plaintiffs' entitlement to relief in this case is clear. The applicable statutes and regulations and the Constitution of the United States require it.

Statutes and Regulations

Section 31-201 of the District of Columbia Code requires that:

> "Every parent, guardian, or other person residing in the District of Columbia who has custody or control of a child between the ages of seven and sixteen years shall cause said child to be regularly instructed in a public school or in a private or parochial school or instructed privately during the period of each year in which the public schools of the District of Columbia are in session . . ."

Under Section 31-203, a child may be "excused" from attendance only when

> " . . . . upon examination ordered by . . . [the Board of Education of the District of Columbia], [the child] is found to be unable mentally or physically to profit from attendance at school: Provided, however, that if such examination shows that such child may benefit from specialized instruction adapted to his needs, he shall attend upon such instruction."

Failure of a parent to comply with Section 31-201 constitutes a criminal offense. D. C. Code 31-207. The Court need not belabor the fact that requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children. The Board of Education is required to make such opportunity available. It has adopted rules and regulations consonant with the statutory direction . . . .

Thus the Board of Education has an obligation to provide whatever specialized instruction that will benefit the child. By failing to provide plaintiffs and their class the publicly supported specialized education to which they are entitled, the Board of Education violates the statutes and its own regulations.

. . . The defendants' conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause.

Not only are plaintiffs and their class denied the publicly supported education to which they are entitled; many are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter. Due process of law requires a hearing prior to exclusion, termination or classification into a special program . . . .

The Defense

The Answer of the defendants to the Complaint contains the following:

> "These defendants say that it is impossible to afford plaintiffs the relief they request unless:
> (a) The Congress of the United States appropriates millions of dollars to improve special education services in the District of Columbia; or
> (b) These defendants divert millions of dollars from funds already specifically appropriated for other educational services in order to improve special educational services. These defendants suggest that to do so would violate an Act of Congress and would be inequitable to children outside the alleged plaintiff class."

This Court is not persuaded by that contention.

The defendants are required by the Constitution of the United States, the District of Columbia Code, and their own regulations to provide a publicly-supported education for these "exceptional" children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds.

. . . The District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

IMPLEMENTATION OF JUDGMENT

. . . The lack of communication and cooperation between the Board of Education and the other defendants in this action shall not be permitted to deprive plaintiffs and their class of publicly supported education. Section 31–104b of the District of Columbia Code dictates that the Board of Education and the District of Columbia Government must coordinate educational and municipal functions . . . .

If the District of Columbia Government and the Board of Education cannot jointly develop the procedures and programs necessary to implement this Court's order then it shall be the responsibility of the Board of Education to present the irresolvable issue to the Court for resolution in a timely manner so that plaintiffs and their class may be afforded their constitutional and statutory rights. If any dispute should arise between the defendants which requires for its resolution a degree of expertise in the field of education not possessed by the Court, the Court will appoint a special master pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure to assist the Court in resolving the issue.

. . . Despite the defendants' failure to abide by the provisions of the Court's previous orders in this case and despite the defendants' continuing failure to provide an education for these children, the Court is reluctant to arrogate to itself the responsibility of administering this or any other aspect of the Public School System of the District of Columbia through the vehicle of a special master. Nevertheless, inaction or delay on the part of the defendants, or failure by the defendants to implement the judgment and decree herein within the time specified therein will result in the immediate appointment of a special master to oversee and direct such implementation under the direction of this Court. The Court will include as a part of its judgment the proposed "Order and Decree" submitted by the Board of Education, as modified in minor part by the Court, and will retain jurisdiction of the cause to assure prompt implementation of the judgment. Plaintiffs' motion to require certain defendants to show cause why they should not be adjudged in contempt will be held in abeyance for 45 days.

JUDGMENT AND DECREE

. . . Judgment is entered in this action as follows:

1. That no child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a Rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may

include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative.

2. The defendants, their officers, agents, servants, employees, and attorneys and all those in active concert or participation with them are hereby enjoined from maintaining, enforcing or otherwise continuing in effect any and all rules, policies and practices which exclude plaintiffs and the members of the class they represent from a regular public school assignment without providing them at public expense (a) adequate and immediate alternative education or tuition grants, consistent with their needs, and (b) a constitutionally adequate prior hearing and periodic review of their status, progress and the adequacy of any educational alternatives; and it is further ORDERED that:

3. The District of Columbia shall provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment. Furthermore, defendants shall not exclude any child resident in the District of Columbia from such publicly-supported education on the basis of a claim of insufficient resources.

4. Defendants shall not suspend a child from the public schools for disciplinary reasons for any period in excess of two days without affording him a hearing pursuant to the provisions of Paragraph 13.f., below, and without providing for his education during the period of any such suspension.

5. Defendants shall provide each identified member of plaintiff class with a publicly-supported education suited to his needs within thirty (30) days of the entry of this order. With regard to children who later come to the attention of any defendant, within twenty (20) days after he becomes known, the evaluation (case study approach) called for in paragraph 9 below shall be completed and within 30 days after completion of the evaluation, placement shall be made so as to provide the child with a publicly supported education suited to his needs.

In either case, if the education to be provided is not of a kind generally available during the summer vacation, the thirty-day limit may be extended for children evaluated during summer months to allow their educational programs to begin at the opening of school in September.

6. Defendants shall cause announcements and notices to be placed in the Washington Post, Washington Star-Daily News, and the Afro-American, in all issues published for a three week period commencing within five (5) days of the entry of this order, and thereafter at quarterly intervals, and shall cause spot announcements to be made on television and radio stations for twenty (20) consecutive days, commencing within five (5) days of the entry of this order, and thereafter at quarterly intervals, advising residents of the District of Columbia that all children, regardless of any handicap or other disability, have a right to a publicly-supported education suited to their needs, and informing the parents or guardians of such children of the procedures required to enroll their children in an appropriate educational program. Such announcements should include the listing of a special answering service telephone number to be established by defendants in order to (a) compile the names, addresses, phone numbers of such children who are presently not attending school and (b) provide further information to their parents or guardians as to the procedures required to enroll their children in an appropriate educational program.

7. Within twenty-five (25) days of the entry of this order, defendants shall file with the Clerk of this Court, an up-to-date list showing, for every additional identified child, the name of the child's parent or guardian, the child's name, age, address and telephone number, the date of his suspension, expulsion, exclusion or denial of placement and, without attributing a particular characteristic to any specific child, a breakdown of such list, showing the alleged causal characteristics for such non-attendance (e.g., educable mentally retarded, trainable mentally retarded, emotionally disturbed, specific learning disability, crippled/other health impaired, hearing impaired, visually impaired, multiple handicapped) and the number of children possessing each such alleged characteristic.

8. Notice of this order shall be given by defendants to the parent or guardian of each child resident in the District of Columbia who is now, or was during the 1971–72 school year or the 1970–71 school year, excluded, suspended or expelled from publicly-supported educational programs or otherwise denied a full and suitable publicly-supported education for any period in excess of two days. Such notice shall include a statement that each such child has the right to receive a free educational assessment and to be placed in a publicly-supported educa-

tion suited to his needs. Such notice shall be sent by registered mail within five (5) days of the entry of this order, or within five (5) days after such child first becomes known to any defendant. Provision of notification for non-reading parents or guardians will be made.

9. a. Defendants shall utilize public or private agencies to evaluate the educational needs of all identified "exceptional" children and, within twenty (20) days of the entry of this order, shall file with the Clerk of this Court their proposal for each individual placement in a suitable educational program, including the provision of compensatory educational services where required.

b. Defendants, within twenty (20) days of the entry of this order, shall, also submit such proposals to each parent or guardian of such child, respectively, along with a notification that if they object to such proposed placement within a period of time to be fixed by the parties or by the Court, they may have their objection heard by a Hearing Officer in accordance with procedures required in Paragraph 13 c., below.

10. a. Within forty-five (45) days of the entry of this order, defendants shall file with the Clerk of the Court, with copy to plaintiffs' counsel, a comprehensive plan which provides for the identification, notification, assessment, and placement of class members. Such plan shall state the nature and extent of efforts which defendants have undertaken or propose to undertake to

(1) describe the curriculum, educational objectives, teacher qualifications, and ancillary services for the publicly-supported educational programs to be provided to class members; and,

(2) formulate general plans of compensatory education suitable to class members in order to overcome the present effects of prior educational deprivations; and

(3) institute any additional steps and proposed modifications designed to implement the matters decreed in paragraphs 5 through 7 hereof and other requirements of this judgement.

11. The defendants shall make an interim report to this Court on their performance within forty-five (45) days of the entry of this order. Such report shall show:

(1) The adequacy of Defendants' implementation of plans to identify, locate, evaluate and give notice to all members of the class.

(2) The number of class members who have been placed, and the nature of their placements.

(3) The number of contested hearings before the Hearing Officers, if any, and the findings and determinations resulting therefrom.

12. Within forty-five (45) days of the entry of this order, defendants shall file with this Court a report showing the expunction from or correction of all official records of any plaintiff with regard to past expulsions, suspensions, or exclusions effected in violation of the procedural rights set forth in Paragraph 13 together with a plan for procedures pursuant to which parents, guardians, or their counsel may attach to such students' records any clarifying or explanatory information which the parent, guardian or counsel may deem appropriate.

13. Hearing Procedures.

a. Each member of the plaintiff class is to be provided with a publicly-supported educational program suited to his needs, within the context of a presumption that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class.

b. Before placing a member of the class in such a program, defendants shall notify his parent or guardian of the proposed educational placement, the reasons therefore, and the right to a hearing before a Hearing Officer if there is an objection to the placement proposed. Any such hearing shall be held in accordance with the provisions of Paragraph 13.e., below.

c. Hereinafter, children who are residents of the District of Columbia and are thought by any of the defendants, or by officials, parents or guardians, to be in need of a program of special education, shall neither be placed in, transferred from or to, nor denied placement in such a program unless defendants shall have first notified their parents or guardians of such proposed placement, transfer or denial, the reasons therefor, and of the right to a hearing before a Hearing Officer if there is an objection to the placement, transfer or denial of placement. Any such hearings shall be held in accordance with the provisions of Paragraph 13.e., below.

d. Defendants shall not, on grounds of discipline, cause the exclusion, suspension, expulsion, postponement, inter-school transfer, or any other denial of access to regular instruction in the public schools to any child for more than two days without first notifying the child's parent or guardian of such proposed action, the reasons therefor, and of the hearing before a Hearing Officer in accordance with the provisions of Paragraph 13.f., below.

e. Whenever defendants take action regarding a child's placement, denial of placement, or transfer, as described in Paragraphs 13.b. or 13.c., above, the following procedures shall be followed:

(1) Notice required hereinbefore shall be given in writing by registered mail to the parent or guardian of the child.

(2) Such notice shall:

(a) describe the proposed action in detail;

(b) clearly state the specific and complete reasons for the proposed action, including the specification of any tests or reports upon which such action is proposed;

(c) describe any alternative educational opportunities available on a permanent or temporary basis;

(d) inform the parent or guardian of the right to object to the proposed action at a hearing before the Hearing Officer;

(e) inform the parent or guardian that the child is eligible to receive, at no charge, the services of a federally or locally funded diagnostic center for an independent medical, psychological and educational evaluation and shall specify the name, address and telephone number of an appropriate local diagnostic center;

(f) inform the parent or guardian of the right to be represented at the hearing by legal counsel; to examine the child's school records before the hearing, including any tests or reports upon which the proposed action may be based, to present evidence, including expert medical, psychological and educational testimony; and, to confront and cross-examine any school official, employee, or agent of the school district or public department who may have evidence upon which the proposed action was based.

(3) The hearing shall be at a time and place reasonably convenient to such parent or guardian.

(4) The hearing shall be scheduled not sooner than twenty (20) days waivable by parent or child, nor later than forty-five (45) days after receipt of a request from the parent or guardian.

(5) The hearing shall be a closed hearing unless the parent or guardian requests an open hearing.

(6) The child shall have the right to a representative of his own choosing, including legal counsel. If a child is unable, through financial inability, to retain counsel, defendants shall advise child's parents or guardians of available voluntary legal assistance including the Neighborhood Legal Services Organization, the Legal Aid Society, the Young Lawyers Section of the D.C. Bar Association, or from some other organization.

(7) The decision of the Hearing Officer shall be based solely upon the evidence presented at the hearing.

(8) Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer.

(9) A tape recording or other record of the hearing shall be made and transcribed and, upon request, made available to the parent or guardian or his representative.

(10) At a reasonable time prior to the hearing, the parent or guardian, or his counsel, shall be given access to all public school system and other public office records pertaining to the child, including any tests or reports upon which the proposed action may be based.

(11) The independent Hearing Officer shall be an employee of the District of Columbia, but shall not be an officer, employee or agent of the Public School System.

(12) The parent or guardian, or his representative, shall have the right to have the attendance of any official, employee or agent of the public school system or any public employee who may have evidence upon which the proposed action may be based and to confront, and to cross-examine any witness testifying for the public school system.

(13) The parent or guardian, or his representative, shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.

(14) Within thirty (30) days after the hearing, the Hearing Officer shall render a decision in writing. Such decision shall include findings of fact and conclusions

of law and shall be filed with the Board of Education and the Department of Human Resources and sent by registered mail to the parent or guardian and his counsel.

(15) Pending a determination by the Hearing Officer, defendants shall take no action described in Paragraphs 13.b. or 13.c., above, if the child's parent or guardian objects to such action. Such objection must be in writing and postmarked within five (5) days of the date of receipt of notification hereinabove described.

f. Whenever defendants propose to take action described in Paragraph 13.d., above, the following procedures shall be followed.

(1) Notice required hereinabove shall be given in writing and shall be delivered in person or by registered mail to both the child and his parent or guardian.

(2) Such notice shall

  (a) describe the proposed disciplinary action in detail, including the duration thereof;

  (b) state specific, clear and full reasons for the proposed action, including the specification of the alleged act upon which the disciplinary action is to be based and the reference to the regulation subsection under which such action is proposed;

  (c) describe alternative educational opportunities to be available to the child during the proposed suspension period;

  (d) inform the child and the parent or guardian of the time and place at which the hearing shall take place;

  (e) inform the parent or guardian that if the child is thought by the parent or guardian to require special education services, that such child is eligible to receive, at no charge, the services of a public or private agency for a diagnostic medical, psychological or educational evaluation;

  (f) inform the child and his parent or guardian of the right to be represented at the hearing by legal counsel; to examine the child's school records before the hearing, including any tests or reports upon which the proposed action may be based; to present evidence of his own; and to confront and cross-examine any witnesses or any school officials, employees or agents who may have evidence upon which the proposed action may be based.

(3) The hearing shall be at a time and place reasonably convenient to such parent or guardian.

(4) The hearing shall take place within four (4) school days of the date upon which written notice is given, and may be postponed at the request of the child's parent or guardian for no more than five (5) additional school days where necessary for preparation.

(5) The hearing shall be a closed hearing unless the child, his parent or guardian requests an open hearing.

(6) The child is guaranteed the right to a representative of his own choosing, including legal counsel. If a child is unable, through financial inability, to retain counsel, defendants shall advise child's parents or guardians of available voluntary legal assistance including the Neighborhood Legal Services Organization, the Legal Aid Society, the Young Lawyers Section of the D.C. Bar Association, or from some other organization.

(7) The decision of the Hearing Officer shall be based solely upon the evidence presented at the hearing.

(8) Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any disposition and of the alternative educational opportunity to be provided during any suspension.

(9) A tape recording or other record of the hearing shall be made and transcribed and, upon request, made available to the parent or guardian or his representative.

(10) At a reasonable time prior to the hearing, the parent or guardian, or the child's counsel or representative, shall be given access to all records of the public school system and any other public office pertaining to the child, including any tests or reports upon which the proposed action may be based.

(11) The independent Hearing Officer shall be an employee of the District of Columbia, but shall not be an officer, employee or agent of the Public School System.

(12) The parent or guardian, or the child's counsel or representative, shall have the right to have the attendance of any public employee who may have evidence upon which the proposed action may be

based and to confront and to cross-examine any witness testifying for the public school system.

(13) The parent or guardian, or the child's counsel or representative, shall have the right to present evidence and testimony.

(14) Pending the hearing and receipt of notification of the decision, there shall be no change in the child's educational placement unless the principal (responsible to the Superintendent) shall warrant that the continued presence of the child in his current program would endanger the physical well-being of himself or others. In such exceptional cases, the principal shall be responsible for insuring that the child receives some form of educational assistance and/or diagnostic examination during the interim period prior to the hearing.

(15) No finding that disciplinary action is warranted shall be made unless the Hearing Officer first finds, by clear and convincing evidence, that the child committed a prohibited act upon which the proposed disciplinary action is based. After this finding has been made, the Hearing Officer shall take such disciplinary action as he shall deem appropriate. This action shall not be more severe than that recommended by the school official initiating the suspension proceedings.

(16) No suspension shall continue for longer than ten (10) school days after the date of the hearing, or until the end of the school year, whichever comes first. In such cases, the principal (responsible to the Superintendent) shall be responsible for insuring that the child receives some form of educational assistance and/or diagnostic examination during the suspension period.

(17) If the Hearing Officer determines that disciplinary action is not warranted, all school records of the proposed disciplinary action, including those relating to the incidents upon which such proposed action was predicated, shall be destroyed.

(18) If the Hearing Officer determines that disciplinary action is warranted, he shall give written notification of his findings and of the child's right to appeal his decision to the Board of Education, to the child, the parent or guardian, and the counsel or representative of the child, within three (3) days of such determination.

(19) An appeal from the decision of the Hearing Officer shall be heard by the Student Life and Community Involvement Committee of the Board of Education which shall provide the child and his parent or guardian with the opportunity for an oral hearing, at which the child may be represented by legal counsel, to review the findings of the Hearing Officer. At the conclusion of such hearing, the Committee shall determine the appropriateness of and may modify such decision. However, in no event may such Committee impose added or more severe restrictions on the child.

14. Whenever the foregoing provisions require notice to a parent or guardian, and the child in question has no parent or duly appointed guardian, notice is to be given to any adult with whom the child is actually living, as well as to the child himself, and every effort will be made to assure that no child's rights are denied for lack of a parent or duly appointed guardian. Again, provision for such notice to non-readers will be made.

15. Jurisdiction of this matter is retained to allow for implementation, modification and enforcement of this Judgment and Decree as may be required.

Joseph C. Waddy
United States District Judge

Date: August 1, 1972

MARYLAND ASSOCIATION FOR RETARDED CHILDREN, et al.

v.

STATE OF MARYLAND

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

EQUITY NO. 100/182/77676

AMENDED DECREE

. . . This Court has taken extensive testimony, heard arguments by counsel, made findings of fact attached hereto, and has filed an EXPLANATORY MEMORANDUM OF DECISION attached hereto. Now, this 3rd day of May, 1974, the Court hereby ORDERS and DECREES:

1. The Court declares that it is the established policy of the State of Maryland to provide a free education to all persons between the ages of five and twenty years, and this includes children with handicaps, and particularly mentally retarded children, regardless of how severely and profoundly retarded they may be. This policy is established by Sec. 73 and Sec. 99 and Sec. 106D of Article 77 of the Annotated Code of Maryland, and by Article 59A.

2. Sec. 73 and Sec. 99 of Article 77 obligates local boards of education to provide or arrange for appropriate educational facilities and services for each mentally retarded child between the ages of five and twenty years who resides in the political sub-division of the local board.

3. Under the provisions of Article 77 referred to above the local board of education must initially determine that the educational program provided or arranged for a child is, in fact, an educational program, and that it is in fact an appropriate program for the child. When the child is placed in an educational program in a state institution it becomes the responsibility of the State to insure that the child is provided an appropriate educational program during the time the child is institutionalized. The right of the State to require the local sub-division to share the cost of such educational programs is not being adjudicated herein.

4. The following *may* constitute "appropriate provision" for a child's education (for purposes of Section 92(a) of Article 77) and "appropriate educational facilities and services" (for purposes of Section 99 of Article 77) but *only* if the placement meets requirements stated herein: placement in a nonpublic day facility, a public or private residential facility, and home and hospital instruction.

5. The obligations referred to above cannot be discharged by referral of a child to another governmental authority or to a non-public school or facility if no opening in programs provided by such other agency or school or facility are available for the child, and as a consequence the child cannot be enrolled but instead must wait on a waiting list for an opening.

6. Provisions for a child's education in a facility not accredited by the Maryland State Department of Education may be appropriate if local educational authorities examine the program at the facility in sufficient detail to be able to determine that the program is in fact educational and appropriate for the child referred to the program. However, if the facility to which the child is referred is in fact educational the facility is subject to the accreditation requirements of Secs. 12 and 28 of Article 77. Therefore the Court *ORDERS* that appropriate standards must be promulgated by the State Department of Education, acting alone or in conjunction with the Mental Retardation Administration, for the accreditation of all educational facilities, including day-care centers and residential treatment facilities, except those church related facilities specifically exempted by Sec. 12 of Article 77. All educational programs conducted by, or subject to licensing by, the Mental Retardation Administration shall be subject to the aforesaid standards. The standards must be promulgated by September 1, 1974 and compliance with the standards must be effected by September 1, 1975.

7. Home and hospital instruction is not an appropriate long-term educational arrangement for any child. As indicated by the bylaws of the State Board of Education, home and hospital instruction is an appropriate arrangement for the education of children who are unable, due to *physical* conditions, to attend school regularly, in cases in which a medical specialist certifies that the child should not attend school because of his physical condition. Mental retardation, however profound, is not a "physical" condition justifying referral to home and hospital instruction in lieu of instruction in school.

8. Mental retardation, *per se*, should not be the sole reason for concluding that home and hospital instruction, or residential placement, or placement in a non residential facility, is "appropriate" for the education of a child. The conclusion that such arrangements are appropriate must be based upon all relevant considerations.

9. Under Article VIII of the Maryland Constitution, and under the provisions of Sections 40, 73, 92(a) and 99 of Article 77, each child in Maryland is entitled to education at no expense to the child or his parents or guardians. When the public schools provide or arrange for the education of a child outside the public schools, the program must be made available free of charge to the child and his parents or guardians. The practice of sending children to non public schools without full funding when the public schools are unable to provide the child with a program is unlawful. When public schools provide or arrange for the education of a child in a

state institution or elsewhere outside the public school system the educational program must be made available without charge to the child and his parents or guardians. The state has an obligation under Article 59A and Article 23 of the Declaration of Rights to fund institutional educational programs that insure appropriate education, so that there is no discrimination against children in the institutions.

10. Since all appropriate educational facilities, including such non public educational facilities as day care centers, will be approved by the State Department of Education pursuant to Paragraph 6 of this decree it will be the obligation of the local boards of education to provide daily transportation for handicapped children to and from the appropriate facility that the boards of education have provided and arranged for, such transportation being required by Sec. 99 of Article 77. This statute only contemplates daily transportation. However, if week-end transportation is furnished by a local board to children at the Maryland School for the Blind or Maryland School for the Deaf there can be no discrimination and comparable transportation must be furnished to those children at the Rosewood State Hospital, Great Oaks and any other facility of the Mental Retardation Administration . . .

13. Officials of the State of Maryland have made to this Court a formal commitment of record to comply with the terms of this decree by the school year beginning in September 1975. Therefore, no specific relief with respect to funding is now ordered herein because of the Court's recognition of practical budgetary considerations. This Court retains jurisdiction over all parties to the end that any appropriate or necessary orders may be issued leading to the fulfillment of the obligations stated in this decree in the school year beginning in September 1975.

John E. Raine, Jr.
Judge

IN THE INTERESTS OF G. H., A CHILD

**Special Education Division of the
Department of Public Instruction of the
State of North Dakota,
Petitioner and Appellee**

v.

**G. H.,
B. H.,
F. H.,
Williston School District No. 1,
Jamestown Crippled Children's School
Director of Institutions of the State
of North Dakota,
Stutsman County Welfare Board, and
Jamestown School District No. 1,
Respondents
and
Williams County Welfare Board and
Public Welfare (Social Service)
Board of the State of
North Dakota,
Respondent and Appellants**

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Filed by Clerk
Supreme Court
April 30, 1974

Civil No. 8930

1. The right to a public school education is a right guaranteed by the North Dakota Constitution. N.D. Constitution, Secs. 147, 148, 11, and 20.

2. The right to a public school education is given to all children with physical or mental handicaps except those, if any there are, who can derive no benefit from education.

3. The right to a public school education, if the State provides it for any children, entitles all children, including those with physical and mental handicaps (except those, if any, who can derive no benefit from education) to a similar opportunity on equal terms as is guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

4. The residence of a child determines the identity of the school district responsible for providing educational opportunity to the child.

5. Assignment of a child requiring special education to a school outside the district of the child's residence does not change the residence of the child.

6. The residence of a child who is made a ward of the State is separate from that of her parents.

DISCUSSION

. . . The first question to arise, incredibly enough, is whether G. H. is entitled to have her tuition paid by anyone. A great many handicapped children in this State have had no education at all, which might indicate that they are entitled to none. A further shadow on their claim to an education has been cast, according to some of the briefs before us, by the decision of the United States Supreme Court in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), which held that education is not a right mandated by the United States Constitution. We will return to the *Rodriguez* case later, but at this point we will consider whether the right to an education is a constitutional right under the Constitution of this State. We held long ago that it is, and we now reiterate that holding.

> "The historic policy of this state, in common with the general policy of every other state in the Union, is to maintain a free public school system for the benefit of all children within specified age limits.
>
> "This policy existed prior to statehood and is crystallized in sections 147 and 148 of the State Constitution, which read as follows:
>
> 'A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without consent of the United States and the people of North Dakota.' [Sec. 147, Constitution of N.D.]
>
> 'The legislative assembly shall provide, at its first session after the adoption of this constitution, for a uniform system for free public schools throughout the state, beginning with the primary and extending through all grades up to and including the normal and collegiate course.' " [Sec. 148, Constitution of N.D.] *Anderson v. Breithbarth,* 62 N.D. 709, 245 N.W. 483, 484 (1932).

We are satisfied that all children in North Dakota have the right, under the State Constitution, to a public school education. Nothing in *Rodriguez, supra,* holds to the contrary. The State of New Jersey has held, since *Rodriguez,* that education is a right under the Constitution of that State. *Robinson v. Cahill,* 62 N.J. 473, 303 A.2d 273 (1973).

Handicapped children are certainly entitled to no less than unhandicapped children under the explicit provisions of the Constitution. Whether those who have been unconstitutionally deprived of education in the past have a constitutionally based claim for compensatory educational effort, we leave for future determination. See *In re H.,* 337 N.Y.S.2d 969, 40 A.D. 860, 72 Misc.2d 59 (Family Court, Queens County, 1972).

For the present, we say only that failure to provide educational opportunity for handicapped children (except those, if any there are, who cannot benefit at all from it) is an unconstitutional violation of the foregoing constitutional provisions, as well as Section 11 of the North Dakota Constitution and Section 20 of the North Dakota Constitution, which provide that all laws of a general nature shall have a uniform operation and that no class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

We find nothing in *Rodriguez, supra,* to persuade us to a different view. On the contrary, education has long been the primary responsibility of the States, and it is only natural that their constitutions should provide for a right to an education; while the Federal Constitution, as *Rodriguez* points out, is silent on the subject of education.

And even the *Rodriguez* opinion indicates that Federal constitutional questions would arise if there were a total deprivation of educational opportunities, as there would be here if none of the parties before us was paying for the education of G. H.

While the Supreme Court of the United States, using the "traditional" equal-protection analysis, held that the Texas system of educational financing, which relied largely upon property taxes, was constitutional, we are confident that the same Court would have held that G. H.'s terrible handicaps were just the sort of "immutable characteristic determined solely by the accident of birth" to which the "inherently suspect" classification would be applied, and that depriving her of a meaningful educational opportunity would be just the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy and sex . . . .

In *Brown v. Board of Education of Topeka,* 374 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Supreme Court said, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." When North Dakota undertakes to supply an education to all, and to require all to attend school, that right must be made available to all, including the handicapped, on equal terms.

The plain language of our constitutional provisions requires this conclusion . . . .

Even if we were disposed to avoid or evade our duty to construe the State Constitution to require educational opportunity for the handicapped (and we are not so disposed), the Federal courts would surely construe the Federal Constitution to require the same result, and properly so. See *Reid v. Board of Education of City of New York*, 453 F.2d 238 (2d Cir. 1971), and Federal cases *supra*.

We hold that G. H. is entitled to an equal educational opportunity under the Constitution of North Dakota, and that depriving her of that opportunity would be an unconstitutional denial of equal protection under the Federal and State Constitutions and of the Due Process and Privileges and Immunities Clauses of the North Dakota Constitution.

Section II:

State and Federal Policy for Exceptional Children

Section Editor

Joseph Ballard

Overview

> The country needs and, unless I mistake its temper, the country demands bold, persistent experimentation. It is common sense to take a method and try it: if it fails, admit it frankly and try another. But above all, try something.
>
> *Franklin Delano Roosevelt*

☐ We would make in this section, as it were, a "modest proposal" to achieve two objectives for the reader:

1. Provide at least a general acquaintance with the broad directions and basic ingredients of public educational policy for exceptional children, state and federal, at this moment in history. One might call this section a report on the "state of the public art" for both handicapped and gifted children.
2. Provide a ready resource of information for the reader that may be helpful at varying times and for varying reasons.

In the spirit of this dual mission, the reader will find Abeson and Ballard in "State and Federal Policy for Exceptional Children" offering an issue oriented roundup. Correspondingly, Forsythe in "Progress for the Severely Handicapped" targets very specifically on the long struggle to direct the public policy forum to the critical needs of the most vulnerable among us.

Thoughtful commentary and valuable resource material are combined for the reader by LaVor in "Federal Legislation for Exceptional Persons: A History" and by Marinelli in "Financing the Education of Exceptional Children". And, in a similar vein, Ballard advises the reader in "Active Federal Education Laws for Exceptional Persons" about the wealth of extant federal education statutes which are intended to impact positively upon exceptional children.

Finally, the reader is provided a set of actual legislative statutes designed to make available precise and accurate supportive information. (And, by the way, they aren't bad reading.) Two of these are "living" laws of historic proportions in their implications for exceptional children ("Education for All Handicapped Children Act of 1975" and "Federal Legislation for the Education of Gifted and Talented Children"). The other, "CEC Model Statutes," may be found useful by the reader for application in his or her own state level environment.

In summary, then, if one might attempt an analogy with the theatre, we have tried to capture in this section the public policy "stage" at this moment in the Republic's history—but we do not tell you whether anyone came to the play. In other words, only time, and how time is utilized by thousands of advocates and thousands of special education professionals, will tell us whether we have had the intended constructive impact on all exceptional children.

ALAN ABESON
JOSEPH BALLARD

State and Federal Policy for Exceptional Children

"(c)It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children." (Statement of Findings and Purpose, The Federal Education for All Handicapped Children Act, P.L. 94–142)

"It is the policy of this state to provide, as an integral part of free public education, special education sufficient to meet the needs and maximize the capabilities of all children with exceptional educational needs. Furthermore, it is the policy of this state to ensure that each child who has exceptional education needs is provided with the opportunity to receive a special education at public expense suited to his individual needs. To obtain this end, the legislature recognizes the necessity for a flexible program of special education and for frequent re-evaluation of the needs, capabilities and progress of a child with exceptional educational needs. (Sec. 1, Chap. 89, Wisconsin Statutes Annoted)."

☐ This chapter is intended to provide a capsule review of the status of public policy with respect to the education of exceptional children, both at the federal and state levels. The reader will observe that, in the federal segments of this chapter, constant reference is made to the Education for All Handicapped Children Act, P.L. 94–142 (signed November 28, 1975). This landmark legislation, aptly referred to as the "Bill of Rights for Handicapped Children," embodies the major features of the overall federal commitment to its handicapped children in both the fundamental areas of *rights* and *revenue*. P.L. 94–142 sets in place the permanent federal financial contribution and sets forth those educational rights guarantees that must be adhered to by the states and their intermediate and local school districts.

RIGHT TO AN EDUCATION

States

In 1972 Abeson reported that almost 70% of the states had adopted mandatory legislation requiring the education of all eligible handicapped children as defined in each state's policies. In 1975 a survey of state law indicated that all but two states had adopted some form of mandatory legislation (see Table 1). The survey further revealed that 37 of the 48 states with mandatory legislation adopted their current special education legislation since 1970. These developments make it clear that state legislators are now aware that no longer can the provision of appropriate education opportunities for handicapped children be considered optional. Of note is that this period of extensive expansion corresponds with the beginning of the right to education litigative movement.

Federal

The US Congress agrees with the direction being taken in the judicial system with respect to the constitutional right to an education, based primarily upon interpretation of the 14th Amendment.

In P.L. 93–380 (signed, August 24, 1974), the Education Amendments of 1974, Title VIII, Section 801, one observes this blunt statement: " . . . the Congress . . . declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers."

Table 1

State Statutory Responsibilities for the Education of Handicapped Children (July 1, 1975)

State	*Type of mandation*	*Date of passage*	*Compliance date*	*Ages of eligibility*	*Categories excluded*
Alabama	Full planning and programing	1971	1977	6-21	Profoundly retarded
Alaska	Full program	1974		From age 3	
Arizona	Selective planning and programing	1973	9/76	5-21	Emotionally handicapped
Arkansas	Full planning and programing[1]	1973	9/79	6-21	
California	Selective			6-18[2]	"Educationally handicapped" (Emotionally disturbed, learning disabled)
Colorado	Full planning and programing	1973	7/75	5-21	
Connecticut	Full planning and programing	1966		4-21[3]	
Delaware	Full program "wherever possible"			4-21	Severely mentally or physically handicapped
District of Columbia	No statute, Court order: Full program	1972	1972	From age 6	
Florida	Full program		1973[4]	3-no max. (13 yrs. guar.)	
Georgia	Full planning and programing	1968	9/75	3-20	
Hawaii	Full program	1949		5-20	
Idaho	Full program[5]	1972[5]		Birth-21	
Illinois	Full program	1965	7/69	3-21[6]	
Indiana	Full planning and programing	1969	1973	6-18[7]	
Iowa	Full program "if reasonably possible"	1974		Birth-21	
Kansas	Full planning and programing	1974	1979[8]	Developmentally Disabled. Birth-21	
Kentucky	Planning and programing	1970	1974		Other than trainable mentally retarded
	(Petition for trainable mentally retarded only)	1962		6-21	
Louisiana	Court order—Orleans Parish only: Selective for mentally retarded. Otherwise, mandatory	1972	1972	3-21[10]	Other than mentally retarded
Maine	Full planning and programing	1973	1975[11]	5-20	

(Continued on next page)

This table was prepared by The Development and Evaluation of State and Local Special Education Administrative Policy Manuals Project of the State-Federal Information Clearinghouse for Exceptional Children of The Council for Exceptional Children, pursuant to a grant from the Bureau of Education for the Handicapped, US Office of Education, Department of Health, Education, and Welfare. The opinions expressed herein, however, do not necessarily reflect the position or policy of the US Office of Education, and no official endorsement should be inferred.

Table 1—continued

State	*Type of mandation*	*Date of passage*	*Compliance date*	*Ages of eligibility*	*Categories excluded*
Maryland	Full planning and programing	1973	1979 [12]	[13]	
Massachusetts	Full planning and programing	1972		3-21	
Michigan	Full planning and programing	1971	9/73	Birth-25	
Minnesota	Full program	7/72 [14]	[14]	4-21, except MR (5-21) and ED (6-21)	
Mississippi	Permissive			Birth-21	
Missouri	Full planning and programing	1973		5-21	
Montana	Full program [15]	1974	7/79	6-21	
Nebraska	Full planning and programing	1973	10/76 [16]	5-18	
Nevada	Full program	1973		5-18 [17]	
New Hampshire	Full program			Birth-21	
New Jersey	Full program	1954 [18]		5-20	
New Mexico	Full planning and programing	1972	9/76	6-21 [19]	
New York	Full program	1973	1973	5-21	Profoundly retarded
North Carolina	Full planning	1974	[20]	Birth-Adulthood [21]	
North Dakota	Full planning and programing	1973	7/80 [22]	5-21 [3]	
Ohio	Permissive			Birth-21	Other than crippled or EMR, deaf, blind, partial hearing or vision
	Selective planning	1972	1973	[23]	Trainable or profoundly mentally retarded
Oklahoma	Full program	1971	9/70	4-21 [24]	
Oregon	Full program	1973		EMR: 6-21 Others: Birth-21	
Pennsylvania	Court order: Selective (mentally retarded only)	1972	9/72	6-21 [25]	Other than mentally retarded
	Full planning and programing	1956	1956	6-21	
Rhode Island	Full program		1964 [26]	3-21 [26]	
South Carolina	Full planning and programing	1972	1977	6-21 [27]	
South Dakota	Full program	1972		Birth-21	
Tennessee	Full planning and programing	1972	9/74 [3]	4-21	
Texas	Full program [28]	1969	9/76 [28]	3-21	
Utah	Full program	1969		5-21	
Vermont	Full program [29]	1972		Birth-21	
Virginia	Full planning	1972	[30]	2-21	
Washington	Full program	1971		6-21 [31]	
West Virginia	Full program	1974	1974	5-23 [32]	
Wisconsin	Full planning and programing	1973	8/74	3-21	
Wyoming	Full program	1969		6-21	

Table 1—continued

NOTE: Definitions of the kinds of mandatory legislation used by states are as follows:

- **Full Program Mandate:** Such laws require that programs must be provided where children meet the criteria defining the exceptionality.
- **Planning and Programing Mandate:** This form includes required planning prior to required programing.
- **Planning Mandate:** This kind of law mandates only a requirement for planning.
- **Conditional Mandate:** This kind of law requires that certain conditions must be met in or by the local education district before mandation takes effect (this usually means that a certain number of children with like handicaps must reside in a district before the district is obliged to provide for them).
- **Mandate by Petition:** This kind of law places the burden of responsibility for program development on the community in terms of parents and interested agencies who may petition school districts to provide programs.
- **Selective Mandate:** In this case, not all disabilities are treated equally. Education is provided (mandated) for some, but not all categories of disabilities.

FOOTNOTES

[1] Current statute is conditional: 5 or more similarly handicapped children in district. However, a 1973 Attorney General's opinion stated that the law mandating full planning and programming was effective July, 1973. If the state activates a kindergarten program for 5-year-old children, ages of eligibility will be 5-21.

[2] Permissive for children 3-21, except MR: 5 yrs. 8 mos.-21.

[3] 3-21 for hearing impaired. Lower figure applies to age of child as of Jan. 1 of the school year.

[4] 1973 law did not include profoundly retarded; however, a 1974 amendment brought these children under the provisions of the mandatory law. Compliance date for full services to these children is mandated for 1977-78.

[5] Earlier (1963) law was mandatory for all handicapped children except Trainable Mentally Retarded.

[6] 5-21 for speech defective.

[7] Permissive 3-5 and 19-21.

[8] "Developmentally Disabled" means retardation, cerebral palsy or epilepsy. For other disabilities, the state board is to determine ages of eligibility as part of the state plan. Compliance date is 7/1/74 for DD programs.

[9] Permissive: 3-6.

[10] Residents over age 21 who were not provided educational services as children must also be given education and training opportunities.

[11] In cases of significant hardship the commissioner of education may waive enforcement until 1977.

[12] Court order sets deadline in Sept., 1975.

[13] Services must begin as soon as the child can benefit from them, whether or not he is of school age.

[14] Date on which Trainable Mentally Retarded were included under the previously existing mandatory law.

[15] Statute now in effect is selective and conditional: at least 10 Educable Mentally Retarded, 7 Trainable Mentally Retarded, or 10 physically handicapped in school district. *Full* mandation becomes effective 7/1/79.

[16] Acoustically handicapped: 10/1/74.

[17] Aurally handicapped and visually handicapped: birth-18.

[18] Date of original mandatory law, which has since been amended to include all children.

[19] Child must be 6 years old by Jan. 1 of school year.

[20] Implementation date to be specified in preliminary state plan to be submitted to 1975 General Assembly.

[21] Deaf: to age 18—or to age 21 "if need exists."

[22] All children must be served as soon as they are identified as handicapped.

[23] Deaf children to be served at age four.

[24] 2-21 for blind, partially blind, deaf, hard of hearing.

[25] When programs are provided for pre-school age children they must also be provided for mentally handicapped children of the same age.

(Continued on next page)

Table 1—continued

[26] For mentally retarded or multiply handicapped. Others, as defined in regulations. Compliance date established by regulations.

[27] 4-21 for hearing handicapped.

[28] The Texas Educational Agency is operating under the assumption that the law is mandatory, and has requested an opinion from the state Attorney General on this question. Compliance date is as established by state policy if the law does not specify a compliance date.

[29] Within the limits of available funds and personnel.

[30] 9/1/76 established by regulations.

[31] Permissive below 6 years.

[32] Permissive 3-4.

Moreover, in that same legislation, the Congress ordered the state education agencies to develop and submit to the US Commissioner of Education long range, detailed blueprints of plans to achieve full educational opportunity for all handicapped children within each of the states. Suffice it to say, as is clear in one of the epigrams at the opening of this chapter and in subsequent subsections of this chapter, the whole purpose and design of P.L. 94–142, the Education for All Handicapped Children Act, are aimed at terminating the unconstitutional exclusion of handicapped children from the public education system.

At this point in history, increasing sensitivity to the right to education issue is observable at the Presidential level as well. Witness these official remarks by President Gerald Ford, issued in late 1974 subsequent to his meeting with his Committee on Mental Retardation:

> Our school systems must be strengthened, so that they can provide the appropriate education which both the law and our conscience say may not be denied to retarded or otherwise handicapped children. By appropriate education, I mean training in academic, vocational and social skills which will enable these children to live up to their highest potential.

DUE PROCESS

States

Among the most significant new directions in state law is the requirement adopted in many states that due process of law must be provided to the parents and guardians of exceptional children regarding identification, evaluation, and placement. A 1974 review of state law in this area, made prior to the passage of P.L. 93–380, the Education Amendments of 1974, indicated that 12 states had specific laws regarding due process and 13 others required the same through administrative policy (SFICEC, 1974).

While the procedural requirements that are in force in most of the states are essentially similar, some differences exist with regard to the qualifications, selection, and power of the hearing officers or tribunals used. For example, in many states, hearing officers are selected at the state level, are employed for this purpose by the state, and are independent of the local education agency, thus contributing to their ability to function "impartially." In other states, employees or the board of the local system assumes this responsibility. Colorado statutes, for example, assign that task to the local board of education and state further that "the final approval of the enrollment of any eligible handicapped child in a special educational program shall be made by the board of education of the school district of the child's residence" (Sec. 123–22–8, Colo. revised statutes). The impetus of P.L. 93–380 and P.L. 94–142 plus that provided by the pending and completed litigation will produce due process statutes in all states within a short time.

Federal

The maintenance of fundamental due process procedures was not only acknowledged recently by the federal government, but was also made a condition upon the states for continued receipt of federal monies (Education of the Handicapped Act, Part B) for the education of handicapped children.

In the Education Amendments of 1974 (P.L. 93–380), the Congress ordered an immediate assurance from the states that procedures were in place to guarantee that all handicapped children within each state and their parents are assured of procedural safeguards in all decisions regarding identification, evaluation, and educational placement of handicapped children.

In the successor act, P.L. 94–142, these due process safeguards and the required procedural ingredients are restated and are constructively refined toward the following objectives:

1. To strengthen the rights of all involved.
2. To conform more precisely to court decrees.
3. To clarify certain aspects of the earlier statutes.

4. To guarantee the rights of all parties with respect to potential court review.
5. To insure maximum flexibility in order to conform to the varying due process procedures among the states.

Readers will observe that P.L. 94-142 is reprinted *in toto* elsewhere in this section and they are encouraged to read Section 615, "Procedural Safeguards," in its entirety.

LEAST RESTRICTIVE ALTERNATIVE

States

Many recently passed state statutes that require due process also mandate the use of placement schemes that emphasize the least restrictive alternative. This policy is based on the assumption that there are various types of settings that differ in terms of programs offered and their distance from the regular education program. As the distance from the regular education setting increases, the amount of the restrictiveness on the child's functioning, as well as the possibility of stigma, increases. The following passage from the Tennessee law is representative of the expression of this principle in other state statutes:

> "To the maximum extent practicable, handicapped children shall be educated along with children who do not have handicaps and shall attend regular classes. Impediments to learning and to the normal functioning of handicapped children in the regular school environment shall be overcome by the provision of special aids and services rather than by separate schooling for the handicapped. Special classes, separate schooling or other removal of handicapped children from the regular educational environment, shall occur only when, and to the extent that the nature or severity of the handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily. (Tenn. Code Ann. 49-2913(B)

To be emphasized is that this directive is not limited to mildly handicapped children but applies to all handicapped children. The adoption of these provisions by individual states has also been heightened by federal legislation and the litigative movement. An indication of this advance was reported by the National Education Association. In a press release dated October 10, 1975, they announced that in a survey of 44 of their state affiliates, "22 or 50% reported there was a state law or regulation in effect that handicapped children be placed in regular classes at least some of the time."

Federal

While clearly and forthrightly invoking the right of handicapped children to instruction in the "least restrictive" educational environment, the federal government at the same time is concerned that each child's individual educational needs will be fully met.

P.L. 94-142 requires that all handicapped children "to the maximum extent appropriate" shall be educated "with children who are not handicapped." In other words, all handicapped children shall be educated as closely as possible, depending on their individual needs and disabilities, to nonhandicapped children. P.L. 94-142 acknowledges that "special classes, separate schooling or other removal from the regular educational environment will be required to meet the appropriate instructional needs of many children when 'the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.' The Congress clearly desires that the principle of integration, not segregation, be the governing objective for all children.

NONDISCRIMINATORY EVALUATION

States

Many of the problems surrounding racial and cultural minority children and special education can to a large degree be resolved through implementation of due process. Yet there has been additional specific state legislation passed that also deals with these issues. In addition to requiring due process, California law (Sec. 6902.7, Cal. Educ. Code) now calls for verbal or nonverbal individual intelligence tests in the child's primary home language for children being considered for placement in classes for the mentally retarded. Primary home language is defined as the language in which the child is most fluent and has his best speaking ability and capacity to understand.

In addition to specifying the scores required for placement, assurances are included in the California law to force consideration of the score in relation to the child's "developmental history, cultural background and school achievement" (Sec. 6902.085). Further, the psychologist administering the instrument must be fluent in the child's home language (Sec. 6902.085), and the assessment must include estimates of adaptive behavior (Sec. 6902.08). Finally, the law requires all local education agencies to report annually to the state data regarding the ethnic breakdown of children in programs for the mentally retarded (Sec. 6902.08).

While the specificity of the California statutes appears to be unmatched in other states, increasingly, other state laws and corresponding regulations prohibit placements in special education programs solely on the basis of an IQ score and the recommendations of single professionals. Georgia's new regulations (1975), for example, required that "each school system shall insure that whenever testing of a child is required or permitted by these regulations, the results of ability, aptitude or achievement tests shall not be used exclusively or principally as the basis for any finding or conclusion" (Ga. Dept. of Education, Regulations and Procedures, 1975). Similar provisions are contained in the Massachusetts statutes (Mass. Dept. of Education, Bartley-Daly Act 766 Mass Regulations, Sec. 322, 1974, p. 5), but Massachusetts law also includes the requirement that department approved tests must be "as free as possible from cultural or linguistic bias or whenever necessary, separately evaluated with reference to the linguistic and cultural group to which the child belongs" (Sec. 7, Chap. 718, 1972).

Federal

The issue of racial and/or cultural discrimination in the assignment of children to special instructional placements is a matter of the gravest concern to the Congress. Hence, P.L. 93-380, the Education Amendments of 1974, clearly orders the states to establish "procedures to insure that the testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory." The successor act, P.L. 94-142, strongly reiterates this charge to both the states and their local school districts.

In August of 1975, a year after P.L. 93-380 became law and roughly 3 months before the signing of P.L. 94-142, the Office of Civil Rights at the US Department of Health, Education, and Welfare, combining these provisions with the intent of Title VI of the Civil Rights Act, issued a fairly detailed directive to the nation's chief state school officers toward the further curbing of biased testing and evaluation procedures.

CONFIDENTIALITY

States

While directives regarding the storage, retrieval, and use of student records is increasing at the federal level, to date few states have responded with specific laws and regulations pertaining to the confidentiality of student records. An examination of state regulations regarding student records indicates that the states of Arizona, Connecticut, Iowa, Kentucky, Massachusetts, and Virginia have specific regulations regarding confidentiality for the handicapped. Other states have general statements regarding access procedures to records. At the local education agency level, some schools have realized the need for appropriate procedures and policies and have compiled an extensive series of guidelines to be used by school personnel. These guidelines include procedures regarding the collection of information for pupil files, the rights of professionals to personal files, the maintenance of pupil records with periodic purging of irrelevant and/or old data, and the dissemination of information from pupil files. However, it appears at this time that most local education agencies are relying heavily on the federal guidelines.

Federal

The question of abuses and potential abuses in school record keeping, obviously an especially sensitive and delicate issue for exceptional children and their parents, received considerable national visibility when in 1972 the then Secretary of Health, Education and Welfare, Elliot Richardson, established the Secretary's Advisory Committee on Automated Personal Data Systems.

The labors of that committee have proven quite productive even at the local level and undoubtedly provided a major impetus toward passage of The Family Educational Rights and Privacy Act (often referred to as the "Buckley Amendments" after the author, US Senator James Buckley of New York) as yet another section of P.L. 93-380. This controversial measure sets forth both the access rights and privacy rights with respect to personal school records for children and their parents.

Furthermore, in the same P.L. 93-380, with specific respect to handicapped children, the Congress sought an immediate assurance from the states that "policies and procedures that are developed regarding the identification and location of all handicapped children will be established in accordance with detailed criteria prescribed by the Commissioner to protect the confidentiality of such data and information by the state." P.L. 94–142 reiterates this mandate to both the states and their local school districts. Readers are encouraged to see Abeson's chapter, entitled "Confidentiality and Record Keeping," which appears in the first section of this book.

INDIVIDUALIZATION

States

State law and regulations like those at the federal level are developing in order to insure that every child is the recipient of an individually designed educational plan and the services necessary to make that plan reality. The statutory language in many states abounds with the words "suitable," "appropriate," "specialized instruction," "appropriate to the child's capacity," and "designed to develop the maximum potential of every handicapped person." It is clear that translating those phrases into programs means individualized education.

Such requirements are in evidence in a few locations. Illinois' regulations require that as part of the placement activities, a multidisciplinary conference will "develop an educational plan which indicates specific objectives to be attained by the child" (Art. X, 1973). Wisconsin statutes provide that when a multidisciplinary team recommends a child for special education, it shall recommend an educational program fitted to the individual child's needs (Sec. 115.80(3) WSA). In Massachusetts as well, there are detailed regulations requiring that each child with special needs will be provided with an extensive individual education plan (Mass. Dept. of Education, Bartley-Daly Act 766 Mass Regulations, Sec. 322, 1974).

That which is implicit in this type of approach and which will increasingly be required is that the individual program is based on stated long range, intermediate, and immediate goals for attainment, a detailing of the specific services to be provided to the child, the dates for initiation and duration of services, criteria for evaluation and a schedule for evaluation to determine program effectiveness in relation to the stated objectives and provisions for altering and reviewing the plan and progress on the basis of a predetermined schedule.

Federal

From the standpoint of federal policy, special education may well be remembered as the standard bearer in the promotion of increasing federal attention to the need for individualized education programs for at least all "vulnerable" children, handicapped and nonhandicapped. For example, P.L. 93–380 amendments to Title I of the Elementary and Secondary Education Act (supplementary assistance to economically disadvantaged children) carries a strong recommendation for individualized programs for all children served under that Title.

More specifically, P.L. 94–142, the Education for All Handicapped Children Act, requires the development of an individualized written education program for each handicapped child served within a given state, to be designed initially in consultation with parents or guardians, and to be reviewed and revised as necessary, *but at least annually*. This provision is yet another requirement which must be adhered to in order to receive monies under P.L. 94–142, a condition which must be met beginning in fiscal year 1978.

A review of the legislative history indicates that at least the following premises governed the Congressional inclusion of this requirement:

- Each child requires an educational blueprint custom tailored to achieve his/her maximum potential.
- All principles in the child's educational environment, including the child, should have the opportunity for input in the development of an individualized program of instruction.
- Individualization means specifics and timetables for those specifics, and the need for periodic review of those specifics—all of which produce greatly enhanced fiscal and educational accountability.

Mandated individualized programs have taken hold in other segments of federal public policy. The Vocational Rehabilitation Act of 1973 (P.L. 93–112) and the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (P.L. 94–103) both contain requirements for individualized habilitation programs.

GIFTED

States

A major change that has occurred in state law since 1970 is a reflection of the growing trend of classifying gifted and talented children as exceptional. By 1975, nearly 35 states included this group of children in their definition of exceptional thus making them eligible for special education. Although IQ, usually 130 or above, is still the most common indicator of giftedness in a child, many states are moving toward a less rigid approach, with the intent of including children with artistic, leadership, and other qualities into programs for the gifted. Typical of the descriptions of gifted/talented children is the definition from the Idaho regulations:

> Gifted/talented refers to those children identified by professionally qualified persons who, by virtue of outstanding abilities, are capable of high performance. This includes those students with demonstrated achievement and/or potential ability in one or more of the following areas, singly or in combination; general intellectual ability, specific academic aptitude, creative or productive thinking, leadership ability, and in the visual and performing arts. (Administrative Rules and Regulations, Sec. 1. 19, Idaho State Department of Education, 1975).

Federal

The first major program of support to the states in meeting the special educational needs of gifted and talented children was authorized in P.L. 93-380 (Title IV, Section 404). In the context, readers are referred to another segment of this section, entitled "Federal Legislation for the Education of Gifted and Talented Children."

FINANCE

States

In past years, although better statutes were being passed, adequate funds to achieve implementation were not included. (Marinelli's chapter on finance considers the problems and issues associated with funding programs for exceptional children.) Many states have now made quantum leaps in making dollars available to educate handicapped children. An Education Commission of the States survey in 1974 of nearly half the states indicated that between the 1971-72 and 1973-74 school years, increases in appropriations ranged from 15% (Maine) to 377% (West Virginia). West Virginia's huge percentage increase meant a $2.7 million dollar appropriation for 1973-74, up from the $564,268 available in 1971. In the same period, Arkansas went from $450,000 to $2 million, a 344% increase. The average increase was in the area of 60% (Education Commission of the States, 1974). Despite these increases, it should be remembered that the total additional dollars yet needed to achieve full service for all exceptional children are estimated to be between $4 and 5 billion.

Federal

If one combines the fiscal 1977 appropriation of $110 million for the basic state grant program (EHA, Part B) with the other US Office of Education components for the education of exceptional children, both handicapped and gifted, the federal government is making a contribution somewhere on the lower end of $400 million annually. When compared to the total state and local monetary contribution on a yearly basis (estimated around $4 billion), and when compared to the estimated national need if all exceptional children are to be appropriately served, this is indeed a small sum.

However, P.L. 94-142 will undoubtedly change the financial rules of the game. That legislation authorizes on a gradual basis a most substantial increase in the federal contribution which would peak (at least in theory) somewhere around 25% of the total contribution from all levels of government.

P.L. 94-142 establishes a formula in which the federal government makes a commitment to pay a gradually escalating percentage of the national average expenditure per public school child times the number of handicapped children being served in the school districts of each state in the nation. That percentage will escalate on a yearly basis until 1982 when it will become a permanent 40% for that year and all subsequent years. The escalator formula is as follows:

- Fiscal 1978—$387 million (on a 5% factor).
- Fiscal 1979—$775 million (on a 10% factor).
- Fiscal 1980—$1.2 billion (on a 20% factor).
- Fiscal 1981—$2.32 billion (on a 30% factor).
- Fiscal 1982—$3.16 billion (on a 40% factor).

It should be carefully noted that such a formula carries an inflation factor; i.e., the actual money figure fluctuates with inflationary-deflationary adjustments in the national average per pupil expenditure.

Moreover, P.L. 94-142 contains a substantial pass-through to the local school districts. In the first year of the new formula, 50% of the monies going to each state would be allocated to the local education agencies. In the following year, fiscal 1979, the local education agency entitlement would be enlarged to 75% of the total allocation to a given state, with the state education agency retaining 25%. This 75–25 arrangement commencing in fiscal 1979 becomes the permanent distribution arrangement. The current state control of all funds is retained for the remainder of fiscal 1976 and fiscal 1977.

AGES AND CATEGORIES

States

As can quickly be seen from Table 1, state law has increasingly opened the schoolhouse doors to more and more handicapped children. This expansion has occurred regarding the ages handicapped children first become eligible for service and the ages they lose their eligibility. Also expanded have been the categories of children who are eligible. In some states this has occurred through the continuous addition of categorical labels to the basic law, while in others the definition of eligibility has become general. For example, in Maryland handicapped children are defined as "those children with 'mental, physical, or emotional handicaps' " (Art. 77, Sec. 92 ACM). It can be anticipated that all state policy within the near future will be amended to reflect the now well established principle that all exceptional children are entitled to a free, appropriate public education regardless of their handicap.

Federal

P.L. 94–142 stipulates that all handicapped children, aged 3 to 21 years, may enjoy the special education and related services provided through that measure. There is also provision for the use of federal monies for programs of early identification and screening. Readers are referred to Ballard's chapter entitled "Active Federal Legislation" appearing elsewhere in this section, which contains the federal definition of handicapped children.

Moreover, P.L. 93–380, in conformance with the overall federal goal of ending exclusion, ordered a priority in the use of federal funds for children "still unserved." P.L. 94–142 maintains and broadens that priority in the following manner:

- First priority to children "unserved."
- Second priority to children inadequately served when they are severely handicapped (within each disability).

Finally P.L. 94–142 carries a special incentive grant aimed at encouraging the states to provide special education and related services to its preschool handicapped children. Each handicapped child in the state aged 3 to 5 who is counted as served will generate a special $300 entitlement. It should be noted that this incentive entitlement goes to the state education agency and must be used by that agency to provide preschool services. Additionally, this entitlement is a separate "line item" appropriation, independent of the larger P.L. 94–142 entitlement.

COMPLIANCE

States

In recent years, provision in some states regarding the education of handicapped children have included language intended to achieve compliance with the requirements by the local education agency. One approach has been to specify in statute a date by which the mandated services must be provided (see Table 1).

Although specific dates do represent a forceful statement of legislative intent and form a basis for holding state executive agencies accountable, unfortunately, these statutes do not guarantee immediate program delivery. Another approach to achieve compliance has been the inclusion in law of financial penalties directed at local school agencies that fail to implement the state's mandate. In Maine, law has been adopted providing that, if after the compliance date of July 1, 1975, all eligible exceptional children have not been provided with "the necessary education" by the appropriate administrative unit, the state commissioner of education "may withhold all or such portion of the state aid" as, in his judgment, is warranted (Ch. 404, Sec. 3125). Similar provisions have become law in Missouri (H.B. 474) and Tennessee (Ch. 839, Sec. 8c; Laws of 1972). In Colorado, after determination is made by the department of education that a school district has not provided plans, programs, or services that reasonably satisfy the criteria, rules, regulations, and standards recommended by the state board of education, the state will provide an analysis of the inadequacies and recommendations for improvement. Funding for these districts

> will be provided or continued for a responsible period of time, as determined by the department of education . . . to allow the local district opportunity to satisfy the recommended criteria, rules, regulations, and standards, or to establish a claim for variance based upon conditions indigenous to a local district. (H.B. 1164, Sec 1, 123-22-4, 1973)

Federal

It has been generally agreed that the Congress should fix a chronological date, however innately arbitrary, beyond which no state or locality may, without penalty, fail to guarantee against outright exclusion from the public educational systems. Also, it is felt that the states ought to be given a reasonable, but not lengthy, time period in which to reach "full service."

P.L. 94-142 therefore requires that every state and its localities, if they are to continue to receive funds under this act, must be affording a free public education for all handicapped children aged 3 to 18 by the beginning of the school year (September 1) in 1978. It further orders the availability of such education to all children aged 3 to 21 by September 1, 1980. However, these mandates carry a big "if" in the area of preschool, apparently in the age range of 3 to 5. Under P.L. 94-142, such mandate for children in that group would apply only when such a requirement is not "inconsistent" with state law or practice, or any court decree.

These date-certain assurances must be met as a matter of state eligibility for funding under the act (Section 612).

Moreover, if the US Commissioner of Education finds substantial noncompliance with the various provisions of this act, with emphasis upon the rights guarantees for children and their parents, he shall terminate the funding to a given locality or state under this act, as well as the funding of those programs specifically designed for handicapped children under the following titles:

- Part A of Title I of the Elementary and Secondary Education Act.
- Title III of the Elementary and Secondary Education Act (innovative programs) and its successor, Part C, Educational Innovation and Support, Section 431 of P.L. 93-380.
- The Vocational Education Act.

PLANNING

State

In a majority of the states, law and/or administrative regulations provide for the establishment and maintenance of a variety of planning efforts at both the state and local levels. Most frequently, these activities are clarification of various state policies, program analysis, and recommendations for change. In some states, local districts must submit projected plans for providing special education to the state board of education each year; other states also require long range plans and progress reports. Most states also provide for some type of a state and/or local advisory board, though membership duties and powers vary greatly. The trend, however, is toward the establishment of strong planning and advisory bodies that have responsibility for recommending improvements in special education and then overseeing implementation of the changes. In Wisconsin, for example, the state superintendent must consult with the Council on Special Education concerning all proposed policies and new special education programs, and the council may report the progress of special education program and planning biannually to the legislature (Sec. 115.77(4) and 115.79, Wisconsin Statutes Annotated).

Federal

The states are ordered in P.L. 93-380, and again in its successor P.L. 94-142, to develop and submit to the US Commissioner of Education a comprehensive, long range, detailed blueprint toward achieving the objective of full service for all handicapped children within each state.

In that context, P.L. 94-142 orders that each state shall have an advisory panel to be appointed by the governor or any other official authorized under state law to make such appointments. This panel must be composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents, or guardians of handicapped children, state and local education officials, and administrators of programs for handicapped children.

The panel shall have the following duties:

- Advise the state education agency on unmet needs relative to the education of all handicapped children within the state.
- Comment publicly on rules and regulations issued by the state and procedures proposed by the state for distribution of funds.
- Assist the state in developing and reporting such data and evaluations as may assist the US Commissioner.

Also, in that context, P.L. 94–142 requires that the state educational agency be responsible for ensuring that all requirements of the act are carried out and that all education programs within the state for all handicapped children, including all such programs administered by any other state or local agency, must meet state educational agency standards and be under the general supervision of persons responsible for the education of handicapped children. This provision establishes a single line of authority within one state agency for the education of all handicapped children within each state.

The legislative history suggests that this provision is included in the act for at least the following reasons:

- To centralize accountability, both for the state itself and from the standpoint of the federal government as a participant in the educational mission.
- To encourage the best use of education resources.
- To guarantee complete and thoughtful implementation of the comprehensive state plan for the education of all handicapped children within the state as already required in P.L. 93–380, the Education Amendments of 1974, as well as the implementation of the further planning provisions of this act.
- To ensure day by day coordination of efforts among involved agencies.
- To terminate the all too frequent practice of the bureaucratic "bumping" of children from agency to agency with the net result of no one taking substantive charge of the child's educational well being.
- To squarely direct public responsibility where the child is totally excluded from an educational opportunity.
- To guarantee that the state agency which typically houses the greatest educational expertise has the responsibility for at least supervising the educational mission of all handicapped children.
- To insure a responsible public agency to which parents and guardians may turn when their children are not receiving the educational services to which they are entitled.

PARENT SURROGATE

State

The concept of the parent surrogate, a person appointed to act in place of a parent in the education decision making process for the child whose own parents are unknown or unavailable, or who is a ward of the state, is a precedent set in federal law, P.L. 93–380, Sec. 612 (13) (A) (iii). While the states have not extensively moved to incorporate such provisions in statutes, some movement has begun. In a 1975 amendment to North Carolina's special education law, surrogates were added (Ch. 151 (H 363) and Ch. 563, (S67) 1975 Session Laws). The Connecticut legislature, in House Bill 1461, has directed the state board of education to study ways of protecting the educational rights of such children including the use of parent surrogates. The state board must submit a report to the General Assembly by February 1976, which is to include its recommendations for specific statutory changes necessary to implement its findings.

Federal

P.L. 94–142 requires that, when the parents or guardian of a child are not known or are unavailable or when the child is a legal ward of the state, the state education agency, local education agency, or intermediate education agency (as appropriate) must assign an individual to act as a surrogate for the child in all due process proceedings. Moreover, such assigned individual may not be an employee of the state educational agency, local educational agency, or intermediate educational unit involved in the education or care of the particular child.

PRIVATE SETTINGS

State

Many states (Trudeau, 1973) have had provisions permitting handicapped children to receive their education in private schools under the condition that it could not be appropriately provided in a local or state public program and that the public would assume part or all of the costs. Such provisions are typically described as tuition assistance programs. In many of these states, the amount of funds made available is insufficient to cover all costs resulting in an unfair burden for the paents of these children to assume. While various lawsuits have overturned such provisions, there has not been a sufficient corresponding state legislative response.

Federal

Children in private elementary and secondary schools may receive assistance for their special education under P.L. 94–142 if:

- Such children are placed in or referred to such schools by the state or local education agency as *a means of carrying out public policy.*
- The special education is at no cost to the parents.
- The state education agency determines that participating schools meet the standards that apply to state and local education agencies.
- The children served in such facilities are accorded all of the educational rights they would have if served directly by public agencies.

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MARTIN L. LA VOR

Federal Legislation for Exceptional Persons: A History

☐ In 1974, the Congress passed and the President signed into law 36 bills that directly or indirectly affect America's handicapped and gifted, both children and adults. It is clear that the federal government has accepted at least partial responsibility for this segment of the population and expands its commitment each year. This has not always been the case. Federal involvement was slow in developing; in fact, the total commitment to provide services across the board for all handicapped persons has come about only within the last 20 years. Efforts on behalf of the handicapped (particularly in education) did not begin with the federal government, but rather with the states.

STATE SCHOOLS AND INSTITUTIONS: THE BEGINNING

The beginning of special education programs (according to Weintraub, 1971) can be traced to the development of state schools and institutions for the handicapped. Kentucky in 1823 established the first state school for the deaf. In 1827 a school for the deaf was established in Ohio, and in 1832 the first state schools for the blind were established in Boston and New York City. The following year a state school for the blind began operation in Philadelphia. In 1848 the Massachusetts legislature appropriated $2,500 a year for a 3 year experimental program to train and teach 10 specially selected mentally retarded children. In 1851 the New York state legislature appropriated $6,000 for a similar 2 year experimental program for the "feeble-minded." In 1852 Pennsylvania appropriated funds to a private school to educate the feeble-minded. This appropriation, to what is now the Elwyn Institute in Philadelphia, represented the first use of public funds in a private facility for the education of the handicapped.

In 1869 the city of Boston established the first public day school for the deaf. In 1874 New York City initiated special education classes. The first public school class for the mentally retarded was created in 1896 in Providence, Rhode Island; the first classes for the crippled and the blind were established at the turn of the century in Chicago. Sight saving classes for the partially sighted were begun in Roxbury, Massachusetts, and Cleveland, Ohio, in 1913. In 1917 New York City began an education program for children with cardiac and other health problems.

By 1915 Minnesota had made provision for state aid in the amount of $100 for each child attending a special class and required that teachers of such classes hold special certificates. In 1919 Pennsylvania established the first provisions enabling local school districts to work cooperatively with other school districts to provide special education. In 1920 Massachusetts required local boards of education to determine the number of handicapped children in their school districts and, in the case of the mentally retarded, to provide special classes when there were 10 or more such children. The state provided financial assistance for these ventures. In 1923 Oregon enacted statutes that provided for classes for educationally exceptional children, intended for the gifted as well as for the handicapped child. The next 25 years were characterized by slow but determined growth of special education programs.

It was primarily through these state efforts that basic services for the handicapped began. The federal role as it pertained to the handi-

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capped was limited and intended to solve localized individual problems or meet the needs of specific disability groups such as the blind and the deaf.

EARLY FEDERAL LAWS: 1820's TO 1870's

The first bill related to the handicapped to become national law (January 29, 1827) had nothing to do with services for the handicapped, but provided authority to designate geographically a grant of land. The first part of the law pertained to lands reserved for a "seminary of learning" in the District of East Florida, the second part to the location of the Deaf and Dumb Asylum of Kentucky. The part of this first federal law for the handicapped read as follows:

> That the incorporated Deaf and Dumb Asylum of Kentucky shall have the power, under the direction of the Secretary of the Treasury, of locating so much of the township of land granted to the said institution as has been taken by the claims of those who are entitled to the right of preemption in the territory of Florida, under the provisions of the act aforesaid; which shall be located in sections upon any unappropriated and unreserved lands in either of the territories of Florida or Arkansas; which said tracts, when so located, shall be disposed of by the corporation of said Deaf and Dumb Asylum, agreeably to the provisions of an act passed the fifth of April, one thousand eight hundred and twenty-six, entitled "An act for the benefit of the incorporated Deaf and Dumb Asylum of Kentucky."

After this auspicious start, it was 20 years before the Congress again took action on legislation for the handicapped. A bill enacted on February 18, 1847, allowed 5 additional years for the "trustees of the Centre College of Kentucky, who are also trustees of the Kentucky Asylum for teaching the deaf and dumb, to sell the lands heretofore granted said asylum."

In 1855 the first substantive law for the handicapped established a

> Government Hospital for the Insane in the District of Columbia, and its objects shall be the most humane care and enlightened curative treatment of the insane of the Army and Navy of the United States and the District of Columbia.

This facility came to be known as St. Elizabeth's Hospital. This was the first federally established facility for the "insane," but the facility was designed primarily for individuals who served in either the Army or the Navy. The law also provided that residents of the District of Columbia as well as nonresidents under certain circumstances could be admitted. The new hospital for the first time provided free services for indigent residents of the District of Columbia, private care for nonindigent patients who could pay for treatment, and treatment for individuals who became "insane" while in prison. In addition, treatment was available to individuals who committed criminal acts and were found to be insane.

The initial federal effort in education for the handicapped became law February 16, 1857, in "An Act to Incorporate the Columbia Institution for the Instruction of the Deaf and Dumb, and the Blind." (In 1954 this institution officially became known as Gallaudet College.) This law was significant in that for the first time it authorized the federal government to grant tuition payments to an institution that was established solely to provide education to the handicapped. The law authorized $150 per student per year to cover "maintenance and tuition."

The law further required that the justices of the peace in the cities of Washington and Georgetown and the County of Washington survey all "Deaf and Dumb and Blind persons within their respective wards and districts; who of them are of a teachable age, and also who of them are in indigent circumstances," and report their findings to the president of the institution, who was to provide appropriate services. The law also permitted the institution to receive deaf, dumb, and blind persons from any state or territory of the United States of America and to negotiate terms for their admittance with their parents or guardians.

May 29, 1858, saw the first federal funds appropriated for the handicapped through a law that provided $3,000 per year for 5 years to cover maintenance and tuition of pupils, plus salaries and incidental expenses, of the Columbia Institution. The 1858 law provided for the first time that

> deaf and dumb and blind children of all persons in the military and naval service of the United States, while such persons are actually in such service, shall be entitled to instruction in said institution, on the same terms as deaf and dumb and blind children belonging to the District of Columbia.

In June 1858 an additional $1,000 was appropriated for "extension of stables and erection of sheds in connection with the stock yard" on the institution's grounds.

Possibly the most significant early law relating to the education of the handicapped was signed by President Lincoln April 8, 1864. That act authorized:

> The board of directors of the Columbia Institution for the instruction of the deaf, dumb, and the blind, are hereby, authorized and empowered to grant and confirm such degrees in the liberal arts and sciences to such pupils of the institution, or others, who, by their proficiency in learning or other meritorious distinction they shall think entitled to them, as are usually granted and conferred in colleges; and to grant to such graduated diplomas or certificates, sealed and signed in such manner as said board of directors may determine, to authenticate and perpetuate the memory of such graduation.

In February 1865 an act changed the name to "The Columbia Institution for the Instruction of the Deaf and Dumb." It also provided for blind persons formerly eligible to attend the Institution

> to be instructed in some institution for the education of the blind, in Maryland, or some other state, at a cost not greater for each pupil than is, or may be for the time being, paid by such state, and to cause the same to be paid out of the treasury of the United States.

Another law passed in 1867 provided that "deaf mutes who were not residents of the District of Columbia would be eligible for admission."

On March 3, 1879, the Congress authorized $250,000 to establish a "perpetual fund for the purpose of aiding the education of the blind in the United States of America through the American Printing House for the Blind." This became the first time the federal government authorized dollars to provide materials and other supplies to a specific disability group. The purpose of the fund was to allow the American Printing House to manufacture and furnish embossed books for the blind and other tangible apparatus to be used in their instruction. Following the establishment of the American Printing House for the Blind, the only federal law for the handicapped passed in the next 39 years was an act to provide special mailing privileges for the blind due to the recognition that postage costs for the weighty and bulky braille reading materials for blind persons were very high and presented a hardship for blind individuals.

LEGISLATION SPURRED BY WWI AND WWII

June 27, 1918, ended the 4 decade dearth with the enactment of the first significant federal act for the handicapped in the 20th century, when the "Soldiers' Rehabilitation Act" was unanimously passed by the Congress and signed by President Wilson. The Soldiers' Rehabilitation Act was designed to offer vocational rehabilitation services to veterans who became disabled as a result of World War I conflicts. It was significant that a similar program for disabled civilians was not included in that act because of the great concern that existed regarding the "practicality" of including civilians in such a program, coupled with a widely held view that "rehabilitation of the disabled was not the responsibility of the federal government."

In spite of this initial concern, 2 years later the Citizens Vocational Rehabilitation Act became law. That act, which became the first grant-in-aid program for services, was limited to counseling, job training, job placement, supplying of artificial limbs and other prosthetic devices. Both the Soldiers and the Citizens Rehabilitation Acts made money available for the first time to provide special training services for disabled individuals to prepare them to return to work.

Although there was some legislation for disabled veterans, virtually all other national laws for the handicapped for the period between the two world wars were aimed at providing additional services for the blind. Those laws gave expanded library services, special mailing privileges, an entitlement to operate vending stands in federal buildings, priority for government purchase of blind made products, special financial assistance under the Social Security Act, special income tax exemptions, and special privileges for blind individuals traveling on railroads and buses using interstate routes.

As injuries to soldiers in World War I brought a response from Congress via establishment of vocational rehabilitation programs, World War II also provided the impetus for expanded opportunities and services for the disabled. As a result of the United States involvement in the war, manpower shortages developed throughout the country. It was this shortage that enabled disabled persons to enter the job market and work alongside their nonhandicapped counterparts.

In 1943 the original Citizens' Rehabilitation program was expanded to provide services not only for the physically handicapped but for the mentally ill and mentally retarded as well. The legislation was amended again in 1954 when the Congress added provisions that allowed research, demonstration, and training programs to help upgrade the total scope of rehabilitation activities. In 1965 the program was extended and expanded to include services to a larger number of disabled individuals. In addition, the National Commission on Architectural Barriers was established to study the problems facing the physically disabled. In 1967 the rehabilitation program was extended again in order to establish a national center for deaf-blind youth and adults and also extended rehabilitation services to handicapped migrant agricultural workers and their families.

PUBLIC ASSISTANCE PROGRAMS

In 1935 the Social Security Act became law, and although it was not originally designed for the disabled, it opened the door for provision of income and rehabilitation services for several categories of disabled individuals. The act, when first passed, established a trust fund to finance benefits for aged individuals who contributed during their working years. In subsequent years, the act was amended to include a disability insurance program for disabled workers who had contributed during their working years to that trust fund. Over the years, programs financed through general revenues were added to provide financial assistance and services to the needy blind, families with dependent children, the aged, and the permanently totally disabled.

The disability insurance trust fund was obligated to an annual expenditure for vocational rehabilitation services for its clients of 1.5% of its trust fund expenditures to reimburse the vocational rehabilitation program for services rendered to disability insurance beneficiaries.

In 1965 several major health programs for low income aged, blind and disabled individuals, and families with dependent children were consolidated into a new program called Medicaid. At the same time, Medicare was created to provide medical services for the aged. In 1972 the program was expanded to include disability insurance beneficiaries.

In 1972 the various public assistance programs (aid to the aged, blind, and disabled, and services to these groups) were consolidated into a new title to establish the supplementary security income (SSI) program. Later, services from several titles of the act were reworked and consolidated in a new Title XX, a federal-state program of social services to the Aid for Dependent Children and SSI populations. The SSI program required (as the earlier disability insurance program did) that its under 65 blind and disabled recipients be supplied with vocational rehabilitation services. Again, the services were to be provided through the vocational rehabilitation program and reimbursed by the SSI program.

LEGISLATION STIMULI

Legislation for the handicapped traditionally had its origin because of a particular individual need and/or the pressures from a specific disability group (such as the blind). General programs for all handicapped persons seemed to "happen" because of circumstances; for instance, the vocational rehabilitation services for soldiers and civilians evolved as a result of World War I. As a result of the lack of available manpower during World War II, job opportunities were made available to the handicapped. Once in competitive industry the handicapped proved that they were capable and responsible workers.

Possibly the biggest assist that the handicapped received in terms of public acceptability, and stimulus for further legislation, was the fact that President Kennedy had a retarded sister and Vice President Humphrey had a retarded grandchild. As a result of personal commitments on the part of both men, in 1961 the President appointed the "President's Panel on Mental Retardation" with a mandate to develop a national plan to combat mental retardation. Two years later legislation was passed that implemented several of the panel's recommendations.

In the years that followed, legislation was passed providing funds for states to develop state and community programs and to construct facilities to serve the mentally retarded. Funding was also made available to establish community mental health centers and research, to provide demonstration centers for the education of the handicapped, and to train personnel to work with the handicapped.

INCREASE OF FEDERAL INVOLVEMENT IN EDUCATION

As noted previously, the federal government's involvement in general education did not start until the late 1950's, with legislation for the handicapped not emerging until the 1960's. One of the first federal laws covering education was the Cooperative Research Act (CRA), enacted in 1954. It was designed to foster cooperative research between the federal government and institutions of higher education.

The general attitude toward any federal involvement in education at that time could best be described as "negative to lukewarm." This attitude was clearly brought out by the fact that although the act (CRA) was signed in 1954, no funds were provided by the Congress to implement it until 1957. Then of the $1 million that were appropriated, $675,000 were directed to be spent on research relating to the education of the mentally retarded. This action by the Congress for the first time earmarked general funds specifically for services to the handicapped and set a pattern for legislating and funding that would be followed for the next decade.

In 1958 the negative federal attitude toward aid to education was upset when the Russians launched Sputnik, the first space satellite. In an effort to guarantee that the United States' educational system would not fall behind the Soviets', but would even surpass it, the National Defense Education Act came into being. This act was designed to stimulate programs for scientists and mathematicians whose work was deemed vital to "national defense." Although never specified but certainly implied, this bill was the first recognition that some extra services should be provided for exceptional and gifted students.

The year 1958 also saw the enactment of a law that authorized the making of captioned films for the deaf. (In later years this program was expanded to include all handicapped children requiring special educational services.) It saw as well the establishment of a program to provide funds to train professional personnel who would in turn train teachers to work with the mentally retarded.

In 1961 a law provided support for training classroom teachers of the deaf, and additional legislation in 1963 expanded the program to include teachers of the hard of hearing, speech impaired, visually handicapped, emotionally disturbed, crippled, and other health impaired children.

FEDERAL COMMITMENT THROUGH ESEA

In 1963 Congress established a program to assist states in establishing vocational educational programs, but it was in 1965 that federal aid to education became firmly established when the Elementary and Secondary Education Act (ESEA) became law. It represented the first true commitment by the federal government to improve elementary and secondary education throughout the nation. The funds authorized by the legislation were designed to assist local education agencies in providing programs to meet the special needs of "educationally deprived children."

In 1965 P.L. 89-313 also became law, amending Title I of ESEA to establish grants to state agencies responsible for providing free public education for handicapped children. The new legislation was designed to assist children in state operated or supported schools serving handicapped children who were not eligible for funds under the original act.

In 1966 ESEA was amended to provide assistance for the education of handicapped children. Title VI of the act provided funds to the states to expand, either directly or through local educational agencies, programs and projects to meet the special educational and related needs of handicapped children. The amendment also established the National Advisory Committee on Handicapped Children to advise the Commissioner of Education. The years 1965 and 1966 also saw legislation for the National Technical Institute for the Deaf to be located in Rochester, New York, and for the Model Secondary School for the Deaf on the Gallaudet College campus in Washington, D.C. The most significant occurrence for the handicapped at the time was the establishment by the Congress of the Bureau of Education for the Handicapped in the Office of Education to administer all Office of Education programs designed for the handicapped. The Bureau was created in spite of the vigorous objections of the Administration.

In 1967 ESEA was amended again to include more programs for handicapped children. Regional resource centers providing testing to determine special educational needs of handicapped children were established, along with service centers for the deaf-blind. Funds were authorized to accelerate the recruitment of educational personnel and to improve the dissemination of information about special education programs. Recognition was given to the fact that, although funds provided for the establishment of programs under the ESEA were to include handicapped children, such children were still being excluded. The 1967 amendments earmarked funds from Title III (Supplementary Educational Centers and Services) to guarantee funds specifically for the handicapped, and earmarked funds from Title V to help state educational agencies expand their programs for handicapped children. In 1968 the Congress mandated that at least 10% of each state's allotment of funds authorized under the Vocational Education Act would have to be used for vocational education programs for specifically handicapped individuals.

The Handicapped Children's Early Education Assistance Act also became law in 1968 and was designed to establish experimental preschool and early education programs for the handicapped and could serve as models for state and local educational agencies.

ESEA was amended again in 1969 for the Gifted and Talented Education Assistance Act. Although no funds were earmarked, state departments of education were authorized to provide technical assistance on programs for the gifted and talented and to provide fellowships for teachers of these children. Also included in that act was a provision covering children with specific learning disabilities. That program funded educational and research services for millions of formerly ineligible and unserved children.

DRAMATIC FOCUS ON THE HANDICAPPED IN THE 1970's

During the 1970's attention to the handicapped by the Congress escalated dramatically. For instance, in 1972 the Congress extended the Vocational Rehabilitation Act, which was first enacted in 1940, incorporating many significant changes. The most significant was that for the first time state rehabilitation agencies were directed to give priority when serving clients to "those individuals with the most severe handicaps." The legislation also required that clients have a greater role in determining their rehabilitation programs and that the program be developed jointly by the counselor and the disabled client and include the terms, conditions, rights, and remedies under which short and long range goals would be attained. The act also prohibited discrimination in any program receiving federal financial assistance to any handicapped individual who may be otherwise qualified. There were many other provisions, too many to possibly include in a short review.

The provisions of the 1972 Vocational Rehabilitation Act that unanimously passed both houses of Congress opened a new era for the handicapped because it marked the first time in history that legislation for the handicapped had been vetoed by the President. It had become almost routine for any legislation dealing with the handicapped to be unanimously voted in the subcommittees, in full committees, and on the floor of each house of Congress. Although the Congress passed the first rehabilitation bill unanimously, it was vetoed. What was even more astounding, the second version of the legislation, passed in 1973, was vetoed again. That veto was sustained by the Senate. Legislation agreeable to both branches was at last achieved in P.L. 93-112, which retained those innovative features just described.

Also during the early years of the 1970's, the education of both handicapped and gifted children received extensive Congressional attention, in no small measure because of the right to education lawsuits discussed elsewhere in this volume.

In P.L. 93-380, the Education Amendments of 1974, the Congress approved a massive increase in authorization levels for the basic state grant program (ESEA, Title VI-B), enlarging the potential purse from approximately $100 million to $660 million. These amendments also included vital guarantees of the educational rights of exceptional children and their parents, such as an assurance of due process procedures and assurance of education in the least restrictive environment. Also of great significance in this legislation was the requirement that each state establish a goal of providing full educational opportunities for all handicapped children within each state, along with a comprehensive blueprint and detailed timetable toward the achievement of that objective. That same public law also provided the first wholly independent program of grant support toward meeting the special educational needs of gifted and talented children (Title IV, Section 404).

Barely one year later, on November 29, 1975, the President signed into law a measure that superseded the provisions of P.L. 93-380, the Education of All Handicapped Children Act (P.L. 94-142). Since that legislation of landmark dimensions is discussed elsewhere in this section, it will not be reviewed in this chapter. Suffice it to say that P.L. 94-142 *committed* the federal government to a most substantial financial contribution toward the education of America's handicapped children, and it refined and strengthened those educational rights that had originally received attention in the prior P.L. 93-380. Moreover, P.L. 94-142, which is a comprehensive rewrite of the old Part B of the Education of the Handicapped Act, is permanent legislation with no expiration date, in stark contrast to normal Congressional procedure.

As can be seen by the list (at the end of this chapter) of federal laws for the handicapped, the federal government has made and is continuing to make a significant commitment to the handicapped in the areas of health, education, welfare, housing, transportation, volunteer programs, training, and nutrition.

REFERENCE

Weintraub, F. J. Special education and the government. In *The Encyclopedia of Education* (Vol. 8). New York: Macmillan Co. and Free Press, 1971.

FEDERAL LAWS FOR THE HANDICAPPED

Title	*Date of enactment*	*P.L. No.*
An Act to provide for the location of the two townships of land reserved for a seminary of learning in the territory of Florida, and to complete the location of the grant to the Deaf and Dumb Asylum of Kentucky	1/29/1827	19-8
An Act to extend the time for selling the lands granted to the Kentucky Asylum for teaching the deaf and dumb	2/18/1847	29-11
An Act to establish in the District of Columbia a Government Hospital for the Insane	3/3/1855	33-4
An Act to establish the Columbian Institute for the deaf and dumb	2/16/1857	34-5
An Act to incorporate the Columbian Institution for the Instruction of the Deaf and Dumb and the Blind	2/16/1857	34-46
An Act to amend the "Act to incorporate the Columbian Institution for the Instruction of the Deaf and the Dumb and the Blind"	5/29/1858	35-59
An Act making appropriations for sundry civil expenses of the government (first appropriations bill)	6/12/1858	35-154
An Act to authorize the Columbia Institution for the Deaf and Dumb and Blind to confer degrees	4/8/1864	38-52
An Act making appropriations for sundry civil expenses of the government for the year ending June 30, 1865 and for other purposes	7/2/1864	38-210
An Act to amend an Act entitled, "An Act to incorporate the Columbia Institution for the Instruction of the Deaf and the Dumb and Blind"	2/23/1865	38-50
An Act making appropriations for sundry civil expenses of the government for the year ending June 30, 1868, and for other purposes	3/2/1867	39-167
An Act to amend existing laws relating to Internal Revenue and for other purposes	3/2/1867	39-169
An Act to promote the education of the blind	3/3/1879	45-186
An Act regulating postage on letters written by the blind	7/7/1898	55-HR4304
An Act to promote the circulation of reading matter among the blind	5/27/1904	58-171
An Act to modify the requirements of the Act entitled "An Act to promote the education of the blind," approved 3/3/1879	6/25/1906	59-288
An Act making appropriations for the services of the Post Office Department for the fiscal year ending June 3, 1913, and for other purposes	8/24/12	62-336
Vocational Rehabilitation Act (for discharged military personnel)	6/27/18	65-178
An Act providing additional aid for the American Printing House for the Blind	8/4/19	66-24

Title	*Date of enactment*	*P.L. No.*
An Act to provide for promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment	6/2/20	66-236
An Act providing additional hospital facilities for patients of the Bureau of War Risk Insurance and of the Federal Board for Vocational Education, Division of Rehabilitation, and for other purposes	3/4/21	66-384
An Act to establish a Veterans' Bureau and to improve the facilities and services of such bureau and further to amend and modify the War Risk Insurance Act	8/9/21	67-47
An Act amending Subdivision 5 of Section 302 of the War Risk Insurance Act	12/18/22	67-370
An Act to authorize an appropriation to enable the Director of the United States Veterans Bureau to provide additional hospital facilities	6/5/24	68-197
An Act to amend sections 1, 3, and 6 of an act entitled, "An Act to provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment"	6/5/24	68-200
An Act to incorporate the United States Blind Veterans of the World War	6/7/24	68-218
World War Veterans' Act of 1924	6/7/24	68-242
An Act to amend paragraph (1) of section 22 of the Interstate Commerce Act by providing for the carrying of a blind person, with a guide, for one fare	2/26/27	69-655
An Act to amend the Act providing additional aid for the American Printing House for the Blind	2/8/27	69-584
An Act to amend an Act entitled, "An Act to provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment"	6/9/30	71-317
An Act to provide books for the adult blind	3/3/31	71-787
To amend an Act entitled "An Act to provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment," approved June 2, 1920, as amended	6/30/32	72-222
To amend section 1 of the Act entitled, "An Act to provide books for the adult blind," approved 3/3/31	3/4/33	72-439
To amend the Act entitled, "An Act to promote the circulation of reading matter among the blind," approved April 27, 1904, and Acts supplemental thereto	5/9/34	73-214
To authorize an increase in the annual appropriation for books for the adult blind	6/14/35	74-139

Title	*Date of enactment*	*P.L. No.*
Social Security Act	8/14/35	74-271
To authorize the operation of stands in federal buildings by blind persons, to enlarge the economic opportunities of the blind, and for other purposes	6/20/36	74-732
To provide special rates of postage on matter for the blind	4/15/37	75-37
To authorize an increase in the annual appropriation for books for the adult blind	4/23/37	75-47
To amend the Interstate Commerce Act (seeing eye dogs)	7/5/37	75-184
To amend the Act approved August 4, 1919, as amended, providing additional aid for the American Printing House for the Blind	8/23/37	75-339
United States Housing Act of 1937	9/1/37	75-412
To amend the Acts for promoting the circulation of reading matter among the blind	5/16/38	75-523
To create a Committee on Purchases of Blind-made products and for other purposes—Wagner-O'Day Act of 1938	6/25/38	75-739
To amend the Act entitled, "An Act to provide books for the adult blind," approved 3/3/31	6/7/39	76-118
Social Security Act Amendments of 1939	8/10/39	76-379
To amend the Act entitled "An Act to provide books for the adult blind" approved 3/3/31	6/6/40	76-562
To further amend the Acts for promoting the circulation of reading matter among the blind	10/14/41	77-270
To permit seeing eye dogs to enter government buildings when accompanied by their blind masters, and for other purposes	12/10/41	77-330
To amend section 1 of the Act entitled, "An Act to provide books for the adult blind," approved 3/3/31, as amended	10/1/42	77-726
To amend Title I of Public Law Number 2, 73rd Congress, March 30, 1933, and the Veterans Regulation to provide for rehabilitation of disabled veterans, and for other purposes	3/24/43	78-16
Vocational Rehabilitation Act Amendments of 1943	7/6/43	78-113
To provide revenue, and for other purposes or "The Revenue Act of 1943"	2/25/44	78-235

Title	*Date of enactment*	*P.L. No.*
To amend the Act entitled "An Act to provide books for the adult blind"	6/13/44	78-338
Servicemen's Readjustment Act	6/22/44	78-346
To amend the Act entitled, "An Act to provide books for the adult blind"	8/8/46	79-661
Social Security Act Amendments of 1946	8/10/46	79-719
Revenue Act of 1948	4/2/48	80-471
To amend the Civil Service Act to remove certain discrimination with respect to the appointment of persons having any physical handicap to positions in the classified civil service	6/10/48	80-617
To maintain status quo in respect of certain employment taxes and social security benefits pending action by Congress on extended social security coverage	6/14/48	80-642
Authorizing an appropriation for the work of the President's Committee on National Employ the Physically Handicapped Week	7/11/49	81-162
To permit the sending of braille writers to or from the blind at the same rates as provided for their transportation for repair purposes	9/7/49	81-290
Social Security Act Amendments of 1950	8/28/50	81-734
To restore to seventy pounds and one hundred inches in girth and length combined the maximum weight and size limitations for appliances or parts thereof, for the blind sent through the mails	4/9/52	82-308
To amend the Act approved 8/4/19 as amended, providing additional aid for the American Printing House for the Blind	5/22/52	82-354
To amend the Act entitled, "An Act to provide books for the adult blind"	7/3/52	82-446
Social Security Act Amendments of 1952	7/18/52	82-590
To change the Columbian Institution to Gallaudet College, define its corporate powers, and provide for its organization and administration and other purposes	6/18/54	83-420
To authorize cooperative research in education	7/26/54	83-531
Vocational Rehabilitation Amendments of 1954	8/3/54	83-565
Social Security Amendments of 1954	9/1/54	83-761
To amend the Interstate Commerce Act in order to authorize common carriers and such attendants at the usual fare charged for one person	7/27/56	84-825
Social Security Amendments of 1956	8/1/56	84-880

Title	*Date of enactment*	*P.L. No.*
To amend the Act to promote the education of the blind, approved March 3, 1879, as amended, so as to authorize wider distribution of books and other special instructional material for the blind, to increase the appropriations authorized for this purpose, and for other purposes	8/2/56	84-922
To amend an Act entitled, "An Act to provide books for the adult blind"	9/7/57	85-308
Social Security Amendments of 1958	8/28/58	85-840
National Defense Education Act of 1958	9/2/58	85-864
To provide in the Department of HEW a loan service of captioned films for the deaf	9/2/58	85-905
To encourage expansion of teaching in the education of mentally retarded children through grants to institutions of higher learning and to state educational agencies	9/6/58	85-926
Housing Act of 1959	9/23/59	86-372
Social Security Amendments of 1960	9/13/60	86-778
To make available to children who are handicapped by deafness the specially trained teachers of the deaf needed to develop their abilities and to make available to individuals suffering speech and hearing impairments the specially trained speech pathologists and audiologists needed to help them overcome their handicaps	9/22/61	87-276
To amend the Act to promote the education of the blind, approved March 3, 1879, as amended, so as to authorize wider distribution of books and other special instruction materials for the blind, and to increase the appropriations authorized for this purpose, and to otherwise improve such Act	9/22/61	87-294
Public Welfare Amendments of 1962	7/25/62	87-543
To authorize the employment without compensation from the Government of readers for blind Government employees, and for other purposes	8/29/62	87-614
To provide for the production and distribution of educational and training films for use by deaf persons, and for other purposes	9/28/62	87-715
To establish in the Library of Congress a library of musical scores and other instructional materials to further educational, vocational, and cultural opportunities in the field of music for blind persons	10/9/62	87-765
To amend the Public Health Service Act to provide for the establishment of an Institute of Child Health & Human Development	10/17/62	87-838
Social Security Act Amendments of 1963	10/24/63	88-156
Mental Retardation Facilities & Community Mental Health Centers Construction Act of 1963	10/31/63	88-164

Title	*Date of enactment*	*P.L. No.*
To authorize the President to issue annually a proclamation designating the first week in March of each year as "Save Your Vision Week"	12/30/63	88-242
Hospital & Medical Facilities Amendments of 1964	8/18/64	88-443
To authorize the President to proclaim October 15 of each year as "White Cane Safety Day"	10/6/64	88-628
Social Security Amendments of 1964	10/13/64	88-641
Social Security Amendments of 1964	10/13/64	88-650
Elementary & Secondary Education Act of 1965, as amended	4/11/65	89-10
National Technical Institute for the Deaf Act	6/8/65	89-36
Social Security Amendments of 1965	7/30/65	89-97
Mental Retardation Facilities & Community Mental Health Centers Construction Act of 1965	8/4/65	89-105
Community Health Service Extension Amendments of 1965	8/5/65	89-109
Heart Disease, Cancer and Stroke Amendments of 1965	10/6/65	89-239
Captioned Films for the Deaf Act	10/19/65	89-258
Federal Assistance to State Operated & Supported Schools for the Handicapped	11/1/65	89-313
Vocational Rehabilitation Act Amendments of 1966	11/8/65	89-333
Library Services & Construction Act Amendments of 1966	7/19/66	89-511
An Act to provide books for the adult blind	6/30/66	89-522
Fair Labor Standards Amendments of 1966	9/23/66	89-601
Military Medical Benefits Amendments of 1966	9/30/66	89-614
Model Secondary School for the Deaf Act	10/15/66	89-694
Comprehensive Health Planning & Public Health Services Amendments of 1966, "Partnership for Health"	11/3/66	89-749
Elementary & Secondary Education Act Amendments of 1966	11/3/66	89-750
Higher Education Act Amendments of 1966	11/3/66	89-752
Mental Health Amendments of 1967	6/24/67	90-31
To amend Title V of the Higher Education Act and redesignate it as the Educational Professions Development Act	6/29/67	90-35
Vocational Rehabilitation Amendments of 1967	10/3/67	90-99
To amend the Library Services & Construction Act	11/24/67	90-154
Mental Retardation Amendments of 1967	12/4/67	90-170
Partnership for Health Amendments of 1967	12/5/67	90-174

Title	*Date of enactment*	*P.L. No.*
Postal Revenue & Federal Act of 1967	12/16/67	90-206
Elementary & Secondary Education Amendments of 1967	1/2/68	90-247
Social Security Amendments of 1967	1/2/68	90-248
Vocational Rehabilitation Amendments of 1968	7/7/68	90-391
To increase size of the Board of Directors of Gallaudet College	7/23/68	90-415
To establish a register of blind persons in the District of Columbia, to provide for the mandatory reporting of information concerning such persons and for other purposes	8/3/68	90-458
Elimination of Architectural Barriers to Physically Handicapped	8/12/68	90-480
Establishment of National Eye Institute	8/16/68	90-489
Handicapped Children's Early Education Assistance Act	9/30/68	90-538
Health Services and Facilities Amendments of 1968	10/15/68	90-574
Higher Education Amendments of 1968	10/16/68	90-575
Vocational Education Amendments of 1968	10/16/68	90-576
To authorize the President to issue a proclamation designating the first week in June of 1969 as "Helen Keller Memorial Week"	5/28/69	91-17
To provide for a National Center on Educational Media and Materials for the Handicapped and for other purposes	8/20/69	91-61
Older Americans Act Amendments of 1969	9/17/69	91-69
Tax Reform Act of 1969	12/30/69	91-172
To insure that certain federally constructed facilities be constructed so as to be accessible to the physically handicapped	3/5/70	91-205
To extend the Migrant Health Act for three years, and provide increased authorization therefor	3/12/70	91-209
To provide grants for construction of community mental health centers	3/13/70	91-211
To extend programs of assistance for elementary and secondary education	4/13/70	91-230
Postal Reorganization Act	8/12/70	91-375
To broaden National Employ the Physically Handicapped Week to apply to all handicapped workers	10/8/70	91-442
To provide long term financing for expanded urban mass transportation programs	10/15/70	91-453
To revise certain criteria for handling mentally retarded persons in the Forest Haven Institution in the District of Columbia	10/22/70	91-490

Title	*Date of enactment-*	*P.L. No.*
Developmental Disabilities Services and Facilities Construction Amendments of 1970	10/30/70	91-517
To improve family planning services and population research activities of the federal government	12/24/70	91-572
To authorize Gallaudet College to maintain and operate the Kendall School as a demonstration elementary school for the deaf	12/24/70	91-587
Occupational Safety and Health Act of 1970	12/29/70	91-596
Housing and Urban Development Act of 1970	12/31/70	91-609
To extend for one year the authorization for various programs under the Vocational Rehabilitation Act	12/31/70	91-610
To provide assistance in developing and administering lead-based paint elimination programs	1/13/71	91-695
Wagner-O'Day Amendments	6/23/71	92-28
Military Medical Benefits Amendments	7/29/71	92-58
Revenue Act of 1971	12/10/71	92-178
Intermediate Care Amendments of 1971	12/28/71	92-223
Free or reduced-rate transportation for attendants for the blind	6/22/72	92-316
Education Amendments of 1972	6/23/72	92-318
Social Security Benefit Increase	7/1/72	92-336
Maternal and Child Health Amendments	7/10/72	92-345
Economic Opportunity Amendments of 1972	9/19/72	92-424
Rights of the blind and other physically handicapped in the District of Columbia	10/21/72	92-515
National Advisory Commission on Multiple Sclerosis Act	10/25/72	92-563
Small Business Investment Act Amendments of 1972	10/27/72	92-595
Social Security Amendments of 1972	10/30/72	92-603
Older Americans Comprehensive Services Amendments of 1973	5/3/73	93-29
National Autistic Children's Week	6/15/73	93-42
Health Programs Extension Act of 1973	6/18/73	93-45
Maternal and Child Health Amendments	7/1/73	93-53
Renegotiation Act Amendments	7/9/73	93-66
Committee for Purchase of Products and Services of the Blind and Other Handicapped	7/30/73	93-76
Federal Aid Highway Act of 1973	8/13/73	93-87
Rehabilitation Amendments of 1973	9/26/73	93-112

Title	Date of enactment-	P.L. No.
Domestic Volunteer Services Act of 1973	10/1/73	93-113
Amtrak Improvement Act of 1973	11/3/73	93-146
Lead-based Paint Poisoning Prevention Amendments	11/9/73	93-151
Social Security Amendments of 1973	12/31/73	93-233
Supplemental Security Income Benefits	3/28/74	93-256
General Education Amendments	4/18/74	93-269
National School Lunch & Child Nutrition Act of 1974	6/30/74	93-326
Extend Food Stamp Eligibility to SSI Recipients	7/8/74	93-335
National Research Act	7/12/74	93-348
Wagner-O'Day Act Amendments	7/25/74	93-358
Foreign Equipment Import Duty (Social Security rider)	8/7/74	93-368
Education Amendments of 1974	8/21/74	93-380
Housing and Community Development Act of 1974	8/22/74	93-383
Juvenile Delinquency & Prevention Act of 1974	9/7/74	93-415
Import Duty on Horses (Social Security rider)	10/26/74	93-484
National Mass Transportation Assistance Act of 1974	11/26/74	93-503
Rehabilitation Act Amendments of 1974	12/7/74	93-516
March of Dimes Month	12/30/74	93-561
National Arthritis Act of 1974	1/4/75	93-640
National Health Planning & Resources Development Act of 1974	1/4/75	93-641
Federal-Aid Highway Amendments of 1974	1/4/75	93-643
Community Services Act of 1974	1/4/75	93-644
Social Services Amendments of 1974	1/4/75	93-647
To extend SSI to continue food stamp eligibility for recipients	6/28/75	94-44
Education for All Handicapped Children Act	11/28/75	94-142

Education for All Handicapped Children Act of 1975

◻ The federal Education for All Handicapped Children Act (P.L. 94–142) is the result of nearly 4 years of intensive legislative development, culminating when President Gerald Ford affixed his signature to this historic legislation on November 29, 1975. After extensive hearings conducted by both Chambers of the Congress, hearings held in Washington, D.C., and around the nation, the Senate version of P.L. 94–142 (S. 6) was approved on June 18, 1975, by a vote of 83 to 10. Approximately one month later, on July 29, the House of Representatives followed suit, approving its version by a vote of 375 to 44.

Subsequently, the joint House-Senate compromise bill, usually referred to as the "conference agreement," was approved by even larger margins. The House affirmed the conference agreement by a lopsided 404 to 7, 29 more votes of approval than the bill enjoyed at first passage. The Senate followed with an equally overwhelming "aye" of 87 to 7.

The complete text of P.L. 94–142, the Education for All Handicapped Children Act, follows.

COMPLETE TEXT OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

That this Act may be cited as the "Education for All Handicapped Children Act of 1975".

EXTENSION OF EXISTING LAW

Sec. 2. (a) (1) (A) Section 611 (b) (2) of the Education of the Handicapped Act (20 U.S.C. 1411 (b) (2)) (hereinafter in this Act referred to as the "Act"), as in effect during the fiscal years 1976 and 1977, is amended by striking out "the Commonwealth of Puerto Rico,".

(B) Section 611 (c) (1) of the Act (20 U.S.C. 1411 (c) (1)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "the Commonwealth of Puerto Rico,".

(2) Section 611 (c) (2) of the Act (20 U.S.C. 1411 (c) (2)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "year ending June 30, 1975" and inserting in lieu thereof the following: "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977", and by striking out "2 per centum" each place it appears therein and inserting in lieu thereof "1 per centum".

(3) Section 611 (d) of the Act (20 U.S.C. 1411 (d)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "year ending June 30, 1975" and inserting in lieu thereof the following: "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977".

(4) Section 612 (a) of the Act (20 U.S.C. 1412 (a)), as in effect during the fiscal years 1976 and 1977, is amended—

> (A) by striking out "year ending June 30, 1975" and inserting in lieu thereof "years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977"; and
>
> (B) by striking out "fiscal year 1974" and inserting in lieu thereof "preceding fiscal year".

(b) (1) Section 614 (a) of the Education Amendments of 1974 (Public Law 93–380; 88 Stat. 580) is amended by striking out "fiscal year 1975," and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

(2) Section 614 (b) of the Education Amendments of 1974 (Public Law 93–380; 88 Stat. 580) is amended by striking out "fiscal year 1974" and inserting in lieu thereof the following: "the fis-

cal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

(3) Section 614 (c) of the Education Amendments of 1974 (Public Law 93–380; 88 Stat. 580) is amended by striking out "fiscal year 1974" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

(c) Section 612 (a) of the Act, as in effect during the fiscal years 1976 and 1977, and as amended by subsection (a) (4), is amended by inserting immediately before the period at the end thereof the following: ", or $300,000, whichever is greater".

(d) Section 612 of the Act (20 U.S.C. 1411), as in effect during the fiscal years 1976 and 1977, is amended by adding at the end thereof the following new subsection:

"(d) The Commissioner shall, no later than one hundred twenty days after the date of the enactment of the Education for All Handicapped Children Act of 1975, prescribe and publish in the Federal Register such rules as he considers necessary to carry out the provisions of this section and section 611.".

(e) Notwithstanding the provisions of section 611 of the Act as in effect during the fiscal years 1976 and 1977, there are authorized to be appropriated $100,000,000 for the fiscal year 1976, such sums as may be necessary for the period beginning July 1, 1976, and ending September 30, 1976, and $200,000,000 for the fiscal year 1977, to carry out the provisions of part B of the Act, as in effect during such fiscal years.

STATEMENT OF FINDINGS AND PURPOSE

Sec. 3. (a) Section 601 of the Act (20 U.S.C. 1401) is amended by inserting "(a)" immediately before "This title" and by adding at the end thereof the following new subsections:

"(b) The Congress finds that—

"(1) there are more than eight million handicapped children in the United States today;

"(2) the special educational needs of such children are not being fully met;

"(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

"(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

"(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

"(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

"(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

"(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

"(c) It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612 (2) (B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.".

(b) The heading for section 601 of the Act (20 U.S.C. 1401) is amended to read as follows:

"SHORT TITLE:
STATEMENT OF FINDINGS AND PURPOSE"

DEFINITIONS

Sec. 4. (a) Section 602 of the Act (20 U.S.C. 1402) is amended—

(1) in paragraph (1) thereof, by striking out "crippled" and inserting in lieu thereof "orthopedically impaired", and by inserting immediately after "impaired children" the following: ", or children with specific learning disabilities,";

(2) in paragraph (5) thereof, by inserting immediately after "instructional materials," the following: "telecommunications, sensory, and other technological aids and devices,";

(3) in the last sentence of paragraph (15) thereof, by inserting immediately after "environmental" the following: ", cultural, or economic"; and

(4) by adding at the end thereof the following new paragraphs:

"(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

"(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

"(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614 (a) (5).

"(19) The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

"(20) The term 'excess costs' means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this part or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this part or under such titles.

"(21) The term 'native language' has the meaning given that term by section 703 (a) (2) of the Bilingual Education Act (20 U.S.C. 880b—1 (a) (2)).

"(22) The term 'intermediate educational unit' means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.".

(b) The heading for section 602 of the Act (20 U.S.C. 1402) is amended to read as follows:

"DEFINITIONS"

ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

Sec. 5. (a) Part B of the Act (20 U.S.C. 1411 et seq.) is amended to read as follows:

"PART B.—ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

"ENTITLEMENTS AND ALLOCATIONS

"*Sec. 611.* (a) (1) Except as provided in paragraph (3) and in section 619, the maximum amount of the grant to which a State is entitled under this part for any fiscal year shall be equal to—

"(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services;

multiplied by—

"(B) (i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

"(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this part for the fiscal year ending September 30, 1977.

"(2) For the purpose of this subsection and subsection (b) through subsection (e), the term 'State' does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

"(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to the average of the number of such children receiving special education and related services on October 1 and February 1 of the fiscal year preceding the fiscal year for which the determination is made.

"(4) For purposes of paragraph (1) (B), the term 'average per pupil expenditure', in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

"(5) (A) In determining the allotment of each State under paragraph (l), the Commissioner may not count—

"(i) handicapped children in such State under paragraph (1) (A) to the extent the number of children is greater than 12 per centum of the number of all children aged five to seventeen, inclusive, in such State;

"(ii) as part of such percentage, children with specific learning disabilities to the extent the number of such children is greater than one-sixth of such percentage; and

"(iii) handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

"(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

"(b) (1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1978—

"(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

"(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 612 (3).

"(2) Of the funds which any State may use under paragraph (1) (A)—

"(A) an amount which is equal to the greater of—

"(i) 5 per centum of the total amount of funds received under this part by such State; or

"(ii) $200,000;

may be used by such State for administrative costs related to carrying out sections 612 and 613; and

"(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612 (3).

"(c) (1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—

"(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

"(B) except as provided in paragraph (3), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 612 (3).

"(2) (A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1) (A)—

"(i) an amount which is equal to the greater of—

"(I) 5 per centum of the total amount of funds received under this part by such State; or

"(II) $200,000;

may be used by such State for administrative costs related to carrying out the provisions of sections 612 and 613; and

"(ii) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612 (3).

"(B) The amount expended by any State from the funds available to such State under paragraph (1) (A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

"(3) The provisions of section 613 (a) (9) shall not apply with respect to amounts available for use by any State under paragraph (2).

"(4) (A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if—

"(i) such local educational agency or intermediate educational unit is entitled, under subsection (d), to less than $7,500 for such fiscal year; or

"(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 614.

"(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2) (B) shall not apply to the use of such funds.

"(d) From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b) (1) (B) or subsection (c) (1) (B), as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b) (1) (B) or subsection (c) (1) (B), as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this part.

"(e) (1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

"(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purposes set forth in section 601 (c) in an amount equal to an amount determined by the Commissioner in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts available to all States under this part for that fiscal year. If the aggregate of the amounts, determined by the Commissioner pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

"(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or $35,000, whichever is greater.

"(f) (1) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for such assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1 per centum of the aggregate amounts available to all States under this part for that fiscal year.

" (2) The Secretary of the Interior may receive an allotment under this subsection only after submitting to the Commissioner an application which meets the applicable requirements of section 614 (a) and which is approved by the Commissioner. The provisions of section 616 shall apply to any such application.

" (g) (1) If the sums appropriated for any fiscal year for making payments to States under this part are not sufficient to pay in full the total amounts which all States are entitled to receive under this part for such fiscal year, the maximum amounts which all States are entitled to receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d), which it estimates that it will expend in accordance with the provisions of this part. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

"ELIGIBILITY

"*Sec. 612.* In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

"(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

"(2) The State has developed a plan pursuant to section 613 (b) in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

"(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

"(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

"(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

"(D) policies and procedures are established in accordance with detailed criteria prescribed under section 617 (c); and

"(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

"(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

"(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 614 (a) (5).

"(5) The State has established (A) procedural safeguards as required by section 615, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

"(6) The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

"(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 613.

"STATE PLANS

"*Sec. 613.* (a) Any State meeting the eligibility requirements set forth in section 612 and desiring to participate in the program under this part shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall—

"(1) set forth policies and procedures designed to assure that funds paid to the State under this part will be expended in accordance with the provisions of this part, with particular attention given to the provisions of sections 611 (b), 611 (c), 611 (d), 612 (2), and 612 (3);

"(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241c-2), section 305 (b) (8) of such Act (20 U.S.C. 844a (b) (8)) or its successor authority, and section 122 (a) (4) (B) of the Vocational Education Act of 1963 (20 U.S.C. 1262 (a) (4) (B)), under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

"(3) set forth, consistent with the purposes of this Act, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

"(4) set forth policies and procedures to assure—

"(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services; and

"(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

"(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this part for services to any child who is determined to be erroneously classified as eligible to be counted under section 611 (a) or section 611 (d);

"(6) provide satisfactory assurance that the control of funds provided under this part, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property;

"(7) provide for (A) making such reports in such form and containing such information as the Commissioner may require to carry out his functions under this part, and (B) keeping such records and affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this part;

"(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this part (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

"(10) provide, consistent with procedures prescribed pursuant to section 617 (a) (2), satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this part of the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

"(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to section 617; and

"(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part, and (C) assists the State in developing and reporting such data and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

"(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) as are contained in section 614 (a), except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 614 (a).

"(c) The Commissioner shall approve any State plan and any modification thereof which—

"(1) is submitted by a State eligible in accordance with section 612; and

"(2) meets the requirements of subsection (a) and subsection (b).

The Commissioner shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

"APPLICATION

"*Sec. 614.* (a) A local educational agency or an intermediate educational unit which desires to receive payments under section 611 (d) for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

"(1) provide satisfactory assurance that payments under this part will be used for excess costs directly attributable to programs which—

"(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

"(B) establish policies and procedures in accordance with detailed criteria prescribed under section 617 (c);

"(C) establish a goal of providing full educational opportunities to all handicapped children, including—

"(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 613 (a) (3);

"(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

"(iii) the participation and consultation of the parents or guardian of such children; and

"(iv) to the maximum extent practicable and consistent with the provisions of section 612 (5) (B), the provision of special services to enable such children to participate in regular educational programs;

"(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

"(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

"(2) provide satisfactory assurance that (A) the control of funds provided under this part, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this part (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this part;

"(3) (A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in programs carried out under this part; and

"(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

"(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

"(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program of each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

"(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613 (a); and

"(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 612 (5) (B), 612 (5) (C) and 615.

"(b) (1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application meets the requirements of subsection (a), except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) is approved by the Commissioner under section 613 (c). A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application does not meet the requirements of subsection (a).

"(2) (A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirements set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

"(i) make no further payments to such local educational agency or such intermediate educational unit under section 620 until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

"(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a).

"(B) The provisions of the last sentence of section 616 (a) shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

"(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 615 which is adverse to the local educational agency or intermediate educational unit involved in such decision.

"(c) (1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 611 (c) (4) (A) (i) or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

"(2) (A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agency may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 611 (d) if an individual application of any such local educational agency had been approved.

"(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613 (a) and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

"(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this part, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

"(d) Whenever a State educational agency determines that a local educational agency—

"(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a);

"(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

"(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this part.

"(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 611 (d), to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

"(f) Notwithstanding the provisions of subsection (a) (2) (B) (ii), any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 611 (d) for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

"PROCEDURAL SAFEGUARDS

"*Sec. 615.* (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

"(b) (1) The procedures required by this section shall include, but shall not be limited to—

"(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

"(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

"(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

"(i) proposes to initiate or change, or

"(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

"(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

"(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

"(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

"(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

"(d) Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613 (a) (12)).

"(e) (1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

"(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c) shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

"(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

"(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

"WITHHOLDING AND JUDICIAL REVIEW

"*Sec. 616.* (a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

"(1) that there has been a failure to comply substantially with any provision of section 612 or section 613, or

"(2) that in the administration of the State plan there is a failure to comply with any provision of this part or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Commissioner (A) shall, after notifying the State educational agency, withhold any further payments to the State under this part, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 613 (a) (2) within his jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Commissioner withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this part to specified local educational agencies or intermediate educational units affected by the failure. Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in clause (1) or clause (2), no further payments shall be made to the State under this part or under the Federal programs specified in section 613 (a) (2) within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this part shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

"(b) (1) If any State is dissatisfied with the Commissioner's final action with respect to its State plan submitted under section 613, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner hereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

"(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

"(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

"ADMINISTRATION

"*Sec. 617.* (a) (1) In carrying out his duties under this part, the Commissioner shall—

"(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this part;

"(B) provide such short-term training programs and institutes as are necessary;

"(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

"(D) assure that each State shall, within one year after the date of the enactment of the Education for All Handicapped Children Act of 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

"(2) As soon as practicable after the date of the enactment of the Education for All Handicapped Children Act of 1975, the Commissioner shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this part in order to assure equity among the States.

"(b) In carrying out the provisions of this part, the Commissioner (and the Secretary, in carrying out the provisions of subsection (c)) shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

"(c) The Secretary shall take appropriate action, in accordance with the provisions of section 438 of the General Education Provisions Act, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Commissioner and by State and local educational agencies pursuant to the provisions of this part.

"(d) The Commissioner is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 618 and to carry out his duties under subsection (a) (1) of this subsection without regard to the provisions of title 5, United States Code, relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

"EVALUATION

"*Sec. 618.* (a) The Commissioner shall measure and evaluate the impact of the program authorized under this part and the effectiveness of State efforts to assure the free appropriate public education of all handicapped children.

"(b) The Commissioner shall conduct, directly or by grant or contract, such studies, investigations, and evaluations as are necessary to assure effective implementation of this part. In carrying out his responsibilities under this section, the Commissioner shall—

"(1) through the National Center for Education Statistics, provide to the appropriate committees of each House of the Congress and to the general public at least annually, and shall update at least annually, programmatic information concerning programs and projects assisted under this part and other Federal programs supporting the education of handicapped children, and such information from State and local educational agencies and other appropriate sources necessary for the implementation of this part including—

"(A) the number of handicapped children in each State, within each disability, who require special education and related services;

"(B) the number of handicapped children in each State, within each disability, receiving a free appropriate public education and the number of handicapped children who need and are not receiving a free appropriate public education in each such State;

"(C) the number of handicapped children in each State, within each disability, who are participating in regular educational programs, consistent with the requirements of section 612 (5) (B) and section 614 (a) (1) (C) (iv), and the number of handicapped children who have been placed in separate classes or separate school facilities, or who have been otherwise removed from the regular education environment;

"(D) the number of handicapped children who are enrolled in public or private institutions in each State and who are receiving a free appropriate public education, and the number of handicapped children who are in such institutions and who are not receiving a free appropriate public education;

"(E) the amount of Federal, State, and local expenditures in each State specifically available for special education and related services; and

"(F) the number of personnel, by disability category, employed in the education of handicapped children, and the estimated number of additional personnel needed to adequately carry out the policy established by this Act; and

"(2) provide for the evaluation of programs and projects assisted under this part through—

"(A) the development of effective methods and procedures for evaluation;

"(B) the testing and validation of such evaluation methods and procedures; and

"(C) conducting actual evaluation studies designed to test the effectiveness of such programs and projects.

"(c) In developing and furnishing information under subclause (E) of clause (1) of subsection (b), the Commissioner may base such information upon a sampling of data available from State agencies, including the State educational agencies, and local educational agencies.

"(d) (1) Not later than one hundred twenty days after the close of each fiscal year, the Commissioner shall transmit to the appropriate committees of each House of the Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities conducted under subsection (b).

"(2) The Commissioner shall include in each such report—

"(A) an analysis and evaluation of the effectiveness of procedures undertaken by each State educational agency, local educational agency, and intermediate educational unit to assure that handicapped children receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children in day or residential facilities;

"(B) any recommendations for change in the provisions of this part, or any other Federal law providing support for the education of handicapped children; and

"(C) an evaluation of the effectiveness of the procedures undertaken by each such agency or unit to prevent erroneous classification of children as eligible to be counted under section 611, including actions undertaken by the Commissioner to carry out provisions of this Act relating to such erroneous classification.

In order to carry out such analyses and evaluations, the Commissioner shall conduct a statistically valid survey for assessing the effectiveness of individualized education programs.

"(e) There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

"INCENTIVE GRANTS

"*Sec. 619.* (a) The Commissioner shall make a grant to any State which—

"(1) has met the eligibility requirements of section 612;

"(2) has a State plan approved under section 613; and

"(3) provides special education and related services to handicapped children aged three to five, inclusive, who are counted for the purposes of section 611 (a) (1) (A).

The maximum amount of the grant for each fiscal year which a State may receive under this section shall be $300 for each such child in that State.

"(b) Each State which—

"(1) has met the eligibility requirements of section 612,

"(2) has a State plan approved under section 613, and

"(3) desires to receive a grant under this section,

shall make an application to the Commissioner at such time, in such manner, and containing or accompanied by such information, as the Commissioner may reasonably require.

"(c) The Commissioner shall pay to each State having an application approved under subsection (b) of this section the amount to which the State is entitled under this section, which amount shall be used for the purpose of providing the services specified in clause (3) of subsection (a) of this section.

"(d) If the sums appropriated for any fiscal year for making payments to States under this section are not sufficient to pay in full the maximum amounts which all States may receive under this part for such fiscal year, the maximum amounts which all States may receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(e) In addition to the sums necessary to pay the entitlements under section 611, there are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

"PAYMENTS

"*Sec. 620.* (a) The Commissioner shall make payments to each State in amounts which the State educational agency of such State is eligible to receive under this part. Any State educational agency receiving payments under this subsection shall distribute payments to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this part after the State educational agency has approved applications of such agencies or units for payments in accordance with section 614 (b).

"(b) Payments under this part may be made in advance or by way of reimbursement and in such installments as the Commissioner may determine necessary.".

(b) (1) The Commissioner of Education shall, no later than one year after the effective date of this subsection, prescribe—

(A) regulations which establish specific criteria for determining whether a particular disorder or condition may be considered a specific learning disability for purposes of designating children with specific learning disabilities;

(B) regulations which establish and describe diagnostic procedures which shall be used in determining whether a particular child has a disorder or condition which places such child in the category of children with specific learning disabilities; and

(C) regulations which establish monitoring procedures which will be used to determine if State educational agencies, local educational agencies, and intermediate educational units are complying with the criteria established under clause (A) and clause (B).

(2) The Commissioner shall submit any proposed regulation written under paragraph (1) to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate, for review and comment by each such committee, at least fifteen days before such regulation is published in the Federal Register.

(3) If the Commission determines, as a result of the promulgation of regulations under paragraph (1), that changes are necessary in the definition of the term "children with specific learning disabilities", as such term is defined by section 602 (15) of the Act, he shall submit recommendations for legislation with respect to such changes to each House of the Congress.

(4) For purposes of this subsection:

(A) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(B) The term "Commissioner" means the Commissioner of Education.

(c) Effective on the date upon which final regulations prescribed by the Commissioner of Education under subsection (b) take effect, the amendment made by subsection (a) is amended, in subparagraph (A) of section 611 (a) (5) (as such subparagraph would take effect on the effective date of subsection (a)), by adding "and" at the end of clause (i), by striking out clause (ii), and by redesignating clause (iii) as clause (ii).

AMENDMENTS WITH RESPECT TO EMPLOYMENT OF HANDICAPPED INDIVIDUALS, REMOVAL OF ARCHITECTUAL BARRIERS, AND MEDIA CENTERS

Sec. 6. (a) Part A of the Act is amended by inserting after section 605 thereof the following new sections:

"EMPLOYMENT OF HANDICAPPED INDIVIDUALS

"*Sec. 606.* The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

"GRANTS FOR THE REMOVAL OF ARCHITECTURAL BARRIERS

"*Sec. 607.* (a) Upon application by any State or local educational agency or intermediate educational unit the Commissioner is authorized to make grants to pay part or all of the cost of altering existing buildings and equipment in the same manner and to the same extent as authorized by the Act approved August 12, 1968 (Public Law 90–480), relating to architectural barriers.

"(b) For the purpose of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.".

(b) Section 653 of the Act (20 U.S.C. 1453) is amended to read as follows:

"CENTERS ON EDUCATIONAL MEDIA AND MATERIALS FOR THE HANDICAPPED

"*Sec. 653.* (a) The Secretary is authorized to enter into agreements with institutions of higher education, State and local educational agencies, or other appropriate nonprofit agencies, for the establishment and operation of centers on educational media and materials for the handicapped, which together will provide a comprehensive program of activities to facilitate the use of new educational technology in education programs for handicapped persons, including designing, developing, and adapting instructional materials, and such other activities consistent with the purposes of this part as the Secretary may prescribe in such agreements. Any such agreement shall—

"(1) provide that Federal funds paid to a center will be used solely for such purposes as are set forth in the agreement; and

"(2) authorize the center involved, subject to prior approval by the Secretary, to contract with public and private agencies and organizations for demonstration projects.

"(b) In considering proposals to enter into agreements under this section, the Secretary shall give preference to institutions and agencies—

"(1) which have demonstrated the capabilities necessary for the development and evaluation of educational media for the handicapped; and

"(2) which can serve the educational technology needs of the Model High School for the Deaf (established under Public Law 89–694).

"(c) The Secretary shall make an annual report on activities carried out under this section which shall be transmitted to the Congress.".

CONGRESSIONAL DISAPPROVAL OF REGULATIONS

Sec. 7 (a) (1) Section 431 (d) (1) of the General Education Provisions Act (20 U.S.C. 1232 (d) (1)) is amended by inserting "final" immediately before "standard" each place it appears therein.

(2) The third sentence of section 431 (d) (2) of such Act (20 U.S.C. 1232 (d) (2)) is amended by striking out "proposed" and inserting in lieu thereof "final".

(3) The fourth and last sentences of section 431 (d) (2) of such Act (20 U.S.C. 1232 (d) (2)) each are amended by inserting "final" immediately before "standard".

(b) Section 431 (d) (1) of the General Education Provisions Act (20 U.S.C. 1232 (d) (1)) is amended by adding at the end thereof the following new sentence: "Failure of the Congress to adopt such a concurrent resolution with respect to any such final standard, rule, regulation, or requirement prescribed under any such Act, shall not represent, with respect to such final standard, rule, regulation, or requirement, an approval or finding of consistency with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding.".

EFFECTIVE DATES

Sec. 8. (a) Notwithstanding any other provision of law, the amendments made by sections 2(a), 2(b), and 2(c) shall take effect on July 1, 1975.

(b) The amendments made by sections 2(d), 2(e), 3, 6, and 7 shall take effect on the date of the enactment of this Act.

(c) The amendments made by sections 4 and 5(a) shall take effect on October 1, 1977, except that the provisions of clauses (A), (C), (D), and (E) of paragraph (2) of section 612 of the Act as amended by this Act, section 617 (a) (1) (D) of the Act, as amended by this Act, section 617 (b) of the Act, as amended by this Act, and section 618 (a) of the Act, as amended by this Act, shall take effect on the date of the enactment of this Act.

(d) The provisions of section 5(b) shall take effect on the date of the enactment of this Act.

JOSEPH BALLARD

Federal Legislation for the Education of Gifted and Talented Children

□ Since the 1950's when the US Congress opened the federal door to all areas of education with the passage of the National Defense Education Act, it is ironic to note that the federal response to the special educational needs of America's gifted and talented children has been largely ignored. However, national policy makers demonstrated their growing sensitivity to that neglect, with the passage of the omnibus Education Amendments of 1974 (P.L. 93-380). This comprehensive legislation contains the first substantive authority for support of the special education of the nation's gifted and talented children.

Within the General Provisions section of the current federal education statutes, gifted and talented children are described "in accordance with objective criteria prescribed by the Commissioner, [as] children who have outstanding intellectual ability or creative talent, the development of which requires special activities or services not ordinarily provided by local educational agencies." What follows is the full text of the actual statutes (Title IV, Section 404) as they appear in P. L. 93-380.

GIFTED AND TALENTED CHILDREN

Sec. 404. (a) The Commissioner shall designate an administrative unit within the Office of Education to administer the programs and projects authorized by this section and to coordinate all programs for gifted and talented children and youth administered by the Office.

(b) The Commissioner shall establish or designate a clearinghouse to obtain and disseminate to the public information pertaining to the education of gifted and talented children and youth. The Commissioner is authorized to contract with public or private agencies or organizations to establish and operate the clearinghouse.

(c) (1) The Commissioner shall make grants to State educational agencies and local educational agencies, in accordance with the provisions of this subsection, in order to assist them in the planning, development, operation, and improvement of programs and projects designed to meet the special educational needs of gifted and talented children at the preschool and elementary and secondary school levels.

(2) (A) Any State educational agency or local educational agency desiring to receive a grant under this subsection shall submit an application to the Commissioner at such time, in such manner, and containing such information as the Commissioner determines to be necessary to carry out his functions under this section. Such application shall—

(i) provide satisfactory assurance that funds paid to the applicant will be expended solely to plan, establish, and operate programs and projects which—

(I) are designed to identify and to meet the special educational and related needs of gifted and talented children, and

(II) are of sufficient size, scope, and quality as to hold reasonable promise of making substantial progress toward meeting those needs;

(ii) set forth such policies and procedures as are necessary for acquiring and disseminating information derived from educational research, demonstration and pilot projects, new educational practices and techniques, and the evaluation of the effectiveness of the program or project in achieving its purpose; and

(iii) provide satisfactory assurance that, to the extent consistent with the number of gifted and talented children in the area to be served by the applicant who are enrolled in nonpublic elementary and secondary schools, provision will be made for the participation of such children.

(B) The Commissioner shall not approve an application under this subsection from a local educational agency unless such application has been submitted to the State educational agency of the State in which the applicant is located and such State agency has had an opportunity to make recommendations with respect to approval thereof.

(3) Funds available under an application under this subsection may be used for the acquisition of instructional equipment to the extent such equipment is necessary to enhance the quality or the effectiveness of the program or project for which application is made.

(4) A State educational agency receiving assistance may carry out its functions under an approved application under this subsection directly or through local educational agencies.

(d) The Commissioner is authorized to make grants to State educational agencies to assist them in establishing and maintaining, directly or through grants to institutions of higher education, a program for training personnel engaged or preparing to engage in educating gifted and talented children or supervisors of such personnel.

(e) The Commissioner is authorized to make grants to institutions of higher education and other appropriate nonprofit institutions or agencies to provide training to leadership personnel for the education of gifted and talented children and youth. Such leadership personnel may include, but are not limited to, teacher trainers, school administrators, supervisors, researchers, and State consultants. Grants under this subsection may be used for internships, with local, State, or Federal agencies or other public or private agencies or institutions.

(f) Notwithstanding the second sentence of section 405 (b) (1) of the General Education Provisions Act, the National Institute of Education shall, in accordance with the terms and conditions of section 405 of such Act, carry out a program of research and related activities relating to the education of gifted and talented children. The Commissioner is authorized to transfer to the National Institute of Education such sums as may be necessary for the program required by this subsection. As used in the preceding sentence the term "research and related activities" means research, research training, surveys, or demonstrations in the field of education of gifted and talented children and youth, or the dissemination of information derived therefrom, or all of such activities, including (but without limitation) experimental and model schools.

(g) In addition to the other authority of the Commissioner under this section, the Commissioner is authorized to make contracts with public and private agencies and organizations for the establishment and operation of model projects for the identification and education of gifted and talented children, including such activities as career education, bilingual education, and programs of education for handicapped children and for educationally disadvantaged children. The total of the amounts expended for projects authorized under this subsection shall not exceed 15 per centum of the total of the amounts expended under this section for any fiscal year.

(h) For the purpose of carrying out the provisions of this section, the Commissioner is authorized to expend not to exceed $12,250,000 for each fiscal year ending prior to July 1, 1978.

JOSEPH BALLARD

Active Federal Education Laws for Exceptional Persons

□ This chapter offers a brief characterization of those federal laws currently in force that have as their objective a clear educational target. These particular legislative measures are chosen with the understanding that numerous other federal laws, such as social services and manpower authorities, have a notable, though usually less direct, impact upon the total federal educational mission for exceptional children and youth, both handicapped and gifted.

P.L. 94-142, the Education for All Handicapped Children Act, containing the major federal financial support mechanism to the states and their localities and embodying the essential educational rights guarantees, should be perceived as the core of the federal thrust toward which all other federal legislative components increasingly must gravitate. Since P.L. 94-142 is discussed elsewhere in this section and also since that legislation is printed in its entirety in this section, P.L. 94-142 is not included in the following review.

However, in order to understand the special relationship of P.L. 94-142 to the first components to be discussed here, one must observe that P.L. 94-142 is also Part B of the Education of the Handicapped Act. Hence the initial characterizations in this chapter are of the other segments (Parts A through G) within the same Education of the Handicapped Act. Parenthetically, all programs under the aegis of the Education of the Handicapped Act are administered by the Bureau of Education for the Handicapped within the US Office of Education.

THE EDUCATION OF THE HANDICAPPED ACT

(Originally authorized in P.L. 91-230)

Part A—General Provisions

Handicapped children are defined as

> mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired, or children with specific learning disabilities, who by reason thereof require special education and related services. (*Sec. 602*)

Children with specific learning disabilities are defined as

> those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. (*Sec. 602*)

A bureau for the education and training of the handicapped is established in the US Office of Education, "which shall be the principal agency in the Office of Education for administering and carrying out programs and projects related to the education and training of the handicapped" (*Sec. 603*).

The Commissioner of Education is directed to

Note: For their contribution to this chapter, the author wishes to acknowledge with gratitude Mr. Joseph Owens, Executive Director, Council of State Administrators of Vocational Rehabilitation; and Mr. Robert Gettings, Executive Director, National Association of Coordinators of State Programs for the Mentally Retarded.

establish within the US Office of Education a National Advisory Committee on Handicapped Children. The 15 member committee shall review the administration and operation of programs authorized by the Education of the Handicapped Act and other programs within the Office of Education related to handicapped children. At least eight members of the committee shall be involved in the education and training of the handicapped. In addition, the committee makes recommendations for the improvement of programs for handicapped children. Each year the committee shall report its recommendations to the Commissioner. This report shall be routed to the Secretary of the Department of Health, Education, and Welfare, who will transmit the report, including his recommendations, to the Congress (*Sec. 604*).

Part B—The Education for All Handicapped Children Act (P.L. 94-142)

See comments and discussions of this act elsewhere in this section, as well as a reprint of the entire act.

Part C—Centers and Service to Meet Special Needs of the Handicapped

The Commissioner of Education is authorized to make grants establishing regional resource centers to develop and apply models of appraising the special education needs of handicapped children and to serve as a resource to schools, agencies, and institutions. Centers also develop educational programs to meet the special education needs of the handicapped. Consultative services may be provided and include, when appropriate, consultation with parents or teachers of handicapped children. Periodic reexamination and reevaluation of special education programs and other technical services are also functions of the centers (*Sec. 621*).

Provision is made for the establishment of model centers for deaf-blind children. These centers are designed to develop and provide as early as feasible in life, the specialized, comprehensive, professional, and other services, methods, and aids found to be the most effective with deaf-blind children to enable them to develop to their full potential for adjustment to the world around them. These services may include (a) diagnostic and evaluative services; (b) programs for adjustment, orientation, and education including all necessary professional services; and (c) consultative services for parents and teachers to enable them to understand and deal with the special problems of deaf-blind children.

Transportation may be provided to nonresident students and to parents needing access to the center.

Public or nonprofit agencies, organizations, and institutions may apply for contracts to establish such centers (*Sec. 622*).

The Commissioner of Education is authorized to establish experimental early childhood education programs for the handicapped. Programs approved by the Commissioner must show promise of promoting a comprehensive and strengthened approach to the special problems of these children. Programs are to be distributed geographically and between urban and rural areas. Programs offered under this section should be designed to facilitate intellectual, emotional, physical, mental, social, and language development, encourage parent participation, and acquaint the community with the problems and potentialities of young, handicapped children.

Provision must be made for coordination of these programs with any similar activities in the schools of the communities served. The federal payment cannot exceed 90 percent of the cost of development, operation or evaluation of early childhood programs (*Sec. 623*).

The Commissioner of Education is authorized to provide, as part of any grant or contract under Part C or as a separate contract or grant to an agency, organization, or institution operating a center or providing services which fulfill the purposes of Part C, all or part of the cost of such activities as:

1. Research on meeting the full range of special education needs of handicapped children.
2. Developing or demonstrating new or improved methods contributing to the educational adjustment of such children.
3. Training professional and allied personnel engaged in such programs. Payment of stipends for trainees as well as travel and expense allowances for the trainee and his dependents are allowed.
4. Dissemination of materials and information about effective practices.

The Commissioner is directed to conduct or contract for the conducting of evaluation of such program (*Sec. 624*).

The Commissioner of Education is directed to conduct, either directly or by contract with independent organizations, a thorough and continuing evaluation of the effectiveness of each program assisted under Part C (*Sec. 625*).

Part D—Training Personnel for the Education of the Handicapped

A training program for personnel for education of the handicapped is authorized. The Commissioner of Education may make grants to institutions of higher education and other appropriate nonprofit institutions to aid in the following:

1. Providing training of professional personnel to conduct training of teachers and other specialists in fields related to the education of the handicapped.
2. Providing training for personnel presently engaged or preparing to engage in employment as teachers of the handicapped, supervisors of such teachers, other personnel providing services for the education of handicapped children, or researchers in the fields related to such education.
3. Establishing and maintaining scholarships with stipends and allowances determined by the Commissioner for training personnel in the categories listed above (*Sec. 631*).

The Commissioner may make grants to state educational agencies to assist them in establishing and maintaining, directly or through grants to higher education institutions, programs for training teachers of the handicapped or supervisors of such teachers. These grants shall also be available to assist the institutions in meeting costs of training (*Sec. 632*).

Grants may be made to public or nonprofit private agencies, organizations, or institutions for projects to encourage students and professional personnel to work in the education of the handicapped by developing and distributing innovative materials to assist in recruitment or by publicizing available financial aid. Grants may also be made to disseminate information about available services for the handicapped and to provide referral services for parents, teachers, and other interested persons (*Sec. 633*).

The Commissioner of Education is authorized to make grants to institutions of higher education, to provide training for personnel in physical education and recreation for the handicapped. The Commissioner is also authorized to make grants related to research or teaching in fields related to the physical education and recreation of the handicapped (*Sec. 634*).

Yearly reports to the Commissioner are required of all recipients of training grants (*Sec. 635*).

Part E—Research in the Education of the Handicapped

Grants for research and demonstration purposes may be made to state or local education agencies, institutions of higher education, and other public or nonprofit private education or research agencies or organizations (*Sec. 641*).

These agencies are also eligible for grants and contracts for research and demonstration projects in physical education and recreation for handicapped children (*Sec. 642*).

Panels of experts appointed by the Commissioner are required to advise him before making any grant under Part E of Title VI (*Sec. 643*).

Part F—Instructional Media for the Handicapped

The purpose is to provide captioned films for the deaf in both cultural and educational areas and to facilitate the educational advancement of the handicapped through research, production, and distribution of educational media. The training of persons in the use of educational media for the instruction of the handicapped is also authorized (*Sec. 651*).

The Commissioner is directed to establish a loan service of captioned films and educational media for the handicapped. Distribution of captioned films and other media and equipment may be done through state schools for the handicapped and other such agencies, which are determined to be appropriate local or regional distribution centers (*Sec. 652*).

The Secretary of Health, Education, and Welfare is authorized to enter into agreement with an institution of higher education for the establishment and maintenance of a National Center on Educational Media and Materials for the Handicapped. The Center will provide a comprehensive program to facilitate the use of new educational technology including the design, development, and adaptation of instructional materials. The contract with the institution shall authorize the center, subject to the approval of the secretary, to contract with public and private agencies and organizations for demonstration projects and provide for an annual report of the activities of the Center to the US Congress.

The secretary, in considering applications, shall give preference to institutions that demonstrate the necessary capabilities for the development and evaluation of educational media for the handicapped and meet the educational technology needs of the Model Secondary School for the Deaf established under P.L. 89-694 (Sec. 653).

Part G—Special Program for Children with Specific Learning Disabilities

A program is authorized supporting research training and model centers to meet the needs of children with specific learning disabilities as defined in Part A, Section 602.

The Commissioner may make grants to or contracts with institutions of higher education, state and local education agencies, and other nonprofit agencies and organizations to carry out the following program:

1. Research and related activities, surveys, and demonstrations.
2. Professional training for teachers of children with learning disabilities and supervisors and teachers of such personnel.
3. Establishment and operation of model centers to provide educational evaluation to identify children with learning disabilities.
4. Development and conducting of model programs and assistance to education agencies, organizations, and institutions in making model programs available.

Special consideration will be given to applications proposing innovative and creative approaches to meeting the educational needs of learning disabled children and those that emphasize prevention and early identification. The grants and contracts for the training of personnel should be distributed equitably on a geographic basis, and there should be, if possible, at least one model center in each state (Sec. 661).

THE REHABILITATION ACT OF 1973 (P.L. 93-112)

This Act supersedes all of the Vocational Rehabilitation Act amendments dating back to P.L. 66-236. The Act establishes the statutory basis for the Rehabilitation Services Administration, and authorizes programs to:

1. Develop and implement comprehensive and continuing state plans for meeting the current and future needs for providing vocational rehabilitation services to handicapped individuals and to provide such services for the benefit of such individuals, serving first those with the most severe handicaps, so that they may prepare for and engage in gainful employment.
2. Evaluate the rehabilitation potential of handicapped individuals.
3. Conduct a study to develop methods of providing rehabilitation services to meet the current and future needs of handicapped individuals for whom a vocational goal is not possible or feasible so that they may improve their ability to live with greater independence and self-sufficiency.
4. Assist in the construction and improvement of rehabilitation facilities.
5. Develop new and innovative methods of applying the most advanced medical technology, scientific achievement, and psychological and social knowledge to solve rehabilitation problems and develop new and innovative methods of providing rehabilitation services to handicapped individuals through research, special projects, and demonstrations.
6. Initiate and expand services to groups of handicapped individuals (including those who are homebound or institutionalized) who have been underserved in the past.
7. Conduct various studies and experiments to focus on long neglected problem areas.
8. Promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.
9. Establish client assistance pilot projects.
10. Provide assistance for the purpose of increasing the number of rehabilitation personnel and increasing their skills through training.
11. Evaluate existing approaches to architectural and transportation barriers confronting handicapped individuals, develop new such approaches, enforce statutory and regulatory standards and requirements regarding barrier-free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals.

In provision of vocational rehabilitation services under Title I, an individualized written rehabilitation program is required in the case of each handicapped individual, to be developed jointly by the rehabilitation counselor and the handicapped individual, or his parent or guardian if appropriate. Such a written program shall set forth the terms and conditions as well as the rights and remedies under which goods and services will be provided to the individual (Sec. *102*).

- Such written rehabilitation program shall be reviewed on an annual basis, at which time the individual will be given the opportunity to review and jointly redevelop the terms of the program.
- If evaluation of rehabilitation potential determines that the individual is not capable of achieving a vocational goal, such decision shall be reviewed annually.

Severe handicap is defined as

> the disability which requires multiple services over an extended period of time and results from amputation, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia and other spinal cord conditions, renal failure, respiratory or pulmonary dysfunction, and any other disability specified by the Secretary in regulations he shall prescribe. (Sec. *7*)

Provides in Part D of Title I for a study of needs for services by individuals for whom a vocational goal is not feasible, but who can, through provision of services, be assisted in living more normally in family and community.

Title II of the Act gives identity and emphasis to the research, demonstration, and training activities which were first authorized under the VR Act in 1954.

The Secretary, through the Commissioner, and in cooperation with other programs in the Department of Health, Education and Welfare (HEW), is authorized to make grants to and make contracts with states and public or nonprofit agencies and organizations, including institutions of higher education, to pay part of the costs of projects for the purpose of planning and conducting research, demonstrations, and related activities which bear directly on the development of methods, procedures, and devices to assist in the provision of vocational and comprehensive rehabilitation services to handicapped individuals, especially those with the most severe handicaps, under this Act.

The Rehabilitation Act of 1973 provides several other changes from the earlier Act:

- A new federal mortgage insurance program to assist in the construction of rehabilitation facilities with a limitation of $200 million on the value of insured mortgages.
- Establishment of an architectural and transportation barriers compliance board to enforce existing federal statutory requirements concerning access to public buildings and transportation for the handicapped.
- Requirement that state rehabilitation agencies seek funds from other existing federal assistance programs before any rehabilitation funds may be used for higher education purposes.
- Requirement that an annual report on the program be submitted to the President and the Congress. The report should specifically distinguish among rehabilitation case closures attributable to physical restoration, placement in competitive employment, extended or terminal employment in a sheltered workshop or rehabilitation facility, employment as a homemaker or unpaid family worker, and provision of other services.
- Requirement that the Secretary of HEW establish within his office a clearinghouse on information concerning programs for handicapped individuals. This office shall also be responsible for submitting a long range projection for the provision of comprehensive services to handicapped individuals and shall assist in meeting the goals and priorities set in the projected plan.
- Establishment of a federal interagency committee on handicapped employees to facilitate employment and advancement in federal government jobs for handicapped individuals.
- Prohibition of discrimination in any program or activity receiving federal financial assistance solely by reason of handicap.
- Establishment of demonstration projects for client assistance to provide counselors to inform and advise clients of available benefits under the Act.

THE ECONOMIC OPPORTUNITY ACT AMENDMENTS OF 1972 (P.L. 92-424)

The Secretary of HEW is ordered to establish policies and procedures designed to assure that not less than 10% of the total number of enrollment opportunities in the nation in the Headstart program shall be available for handicapped children and that services shall be provided to meet their special needs. Effective July 1, 1975, a

10% mandate must be in effect in *each* of the states.

The definition of handicapped children under this new preschool mandate is the same as that definition appearing in Section 602 of the Elementary and Secondary Education Act of 1965, as amended: "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education and related services."

The Secretary is further ordered to implement his responsibilities under this mandate in such manner as not to exclude from any Headstart project any child who was participating in the program during the fiscal year ending June 30, 1972.

Within 6 months after the date of enactment of this Act, and at least annually thereafter, the Secretary is ordered to report to the Congress on the status of handicapped children in the Headstart programs, including the number of children being served, their handicapped conditions, and the services being provided such children.

TITLE I, ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (P.L. 89-10)

In recognition of the special educational needs of children of low income families and the impact that concentrations of low income families have on the ability of local educational agencies to support educational programs, the Title provides financial assistance to local educational agencies for the education of children of low income families. The improvement of educational programs in low income areas by various means, including preschool programs, is declared as policy (*Sec. 101*).

Grants to expand and improve educational programs for children in institutions for the delinquent or neglected are made to state agencies and local educational agencies operating or supporting such institutions. Eligible institutions submit proposals in cooperation with state and local agencies such as health, welfare, education, or corrections agencies to the state educational agencies. The allocations for this program are formula based (*Sec. 103*).

P.L. 89-313 amended this Title to provide grants to state agencies directly responsible for providing free public education for handicapped children. Students in state operated and supported institutions for the handicapped qualify for aid under the provisions set forth in this Title:

> In the case of a State agency which is directly responsible for providing free public education for handicapped children (including mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education), the maximum basic grant which that agency shall be eligible to receive under this part for any fiscal year shall be an amount equal to the Federal percentage of the average per pupil expenditure in that State or, if greater, in the United States multiplied by the number of such children in average daily attendance, as determined by the Commissioner, at schools for handicapped children operated or supported by that State agency, in the most recent fiscal year for which satisfactory data are available. Such State agency shall use payments under this part only for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) which are designed to meet the special educational needs of such children. (*Sec. 103*)

Payment to the states for handicapped children in state supported schools and institutions shall be the maximum grant as determined by the formula regardless of sums appropriated (*Sec. 108*).

P.L. 93-380, the Education Amendments of 1974, further amends this Title in the following way (*Sec. 121*):

> (c) A State agency shall use the payments made under this section only for programs and projects (including the acquisition of equipment and, when necessary, the construction of school facilities) which are designed to meet the special educational needs of such children, and the State agency shall provide assurances to the Commissioner that each such child in average daily attendance counted under subsection (b) will be provided with such a program, commensurate with his special needs, during any fiscal year for which such payments are made.
>
> (d) In the case where such a child leaves an educational program for handicapped children operated or supported by the state agency in order to participate in such a program operated or supported by a local educational agency, such child shall be counted under subsection (b) if: (1) he continues to receive an appropriately designed educational program; and (2) the State agency transfers to the local educational agency in whose program such child participates an amount equal to the sums received by such State agency under this section which are attributable to such child, to be used for the purposes set forth in subsection (c).

TITLE III, ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (P.L. 89-10) (As amended by P.L. 93-380)

The Commissioner of Education is directed to

> carry out a program for making grants for supplementary educational centers and assist in the provision of vitally needed educational services not available in sufficient quantity or quality, and to stimulate and assist in the development and establishment of exemplary elementary and secondary school educational programs to serve as models for regular school programs. (*Sec. 301*)

Funds appropriated pursuant to Section 301 may be used for the following purposes:

1. Planning that leads to the development of programs or projects designed to provide supplementary educational activities and services including pilot projects designed to test the effectiveness of plans.
2. The establishment or expansion of exemplary and innovative educational programs including special programs for handicapped children.
3. The establishment, maintenance, operation, and expansion of programs, including the lease or construction of necessary facilities and acquisition of equipment designed to enrich the programs of local elementary and secondary schools.

Supplementary educational services and activities are defined in the law to specifically include the following:

> (A) Comprehensive guidance and counseling, remedial instruction, and school health, physical education, recreation, psychological, social work, and other services designed to enable and encourage persons to enter, remain in, or reenter educational programs, including the provision of special educational programs and study areas during periods when schools are not regularly in session.
>
> (B) Comprehensive academic services and, where appropriate, vocational guidance and counseling for continuing adult education.
>
> (C) Specialized instruction and equipment for students interested in studying advanced scientific subjects, foreign languages, and other academic subjects which are not taught in the local schools or which can be provided more effectively on a centralized basis, or for persons who are handicapped or of preschool age.
>
> (D) Making available modern educational equipment and specially qualified personnel, including artists and musicians, on a temporary basis for the benefit of children in public and other nonprofit schools, organizations, and institutions.
>
> (E) Developing, producing, and transmitting radio and television programs for classroom and other educational use.
>
> (F) In the case of any local educational agency which is making a reasonable tax effort but which is nevertheless unable to meet critical educational needs (including preschool education), because some or all of its schools are seriously overcrowded, obsolete, or unsafe, initiating and carrying out programs or projects designed to meet those needs, particularly those which will result in more effective use of existing facilities.
>
> (G) Providing special educational and related services for persons who are in or from rural areas or who are or have been otherwise isolated from normal educational opportunities, including where appropriate, the provision of mobile educational services and equipment, special home study courses, radio, television, and related forms of instruction, bilingual education methods, and visiting teacher's programs.
>
> (H) Encouraging community involvement in educational programs.
>
> (I) Other specially designed educational programs or projects which meet the purposes of this Title. (*Sec. 303*)

The states are required to establish an advisory council which shall include persons representative of "areas of professional competence dealing with children needing special education," set dates by which local education agencies must submit applications, and submit a state plan to the Commissioner of Education (*Sec. 305*).

> Not less than 15 per centum of the amount which such state receives to carry out the plan in such fiscal year shall be used for special programs or projects for the education of handicapped children. (*Sec. 305*)

The President is directed to appoint a National Advisory Council on Supplementary Centers and Services to review the administration of, general regulations for, and operation of this Title, and to evaluate programs carried out under this Title. Composition of the council shall include "at least one person who has professional competence in the education of handicapped children" (*Sec. 309*).

P.L. 93-380, Part C—Educational Innovation and Support, Section 431, permits the states, with certain restrictions, to consolidate Title III (innovation portion only) with Title V of ESEA (strengthening state departments of education) and Title VIII of ESEA (dropout prevention and school health and nutrition programs).

The states must expend monies under this consolidation (with a state plan approved by the

Commissioner) for the following broad purposes:

1. For supplementary educational centers and services to stimulate and assist in the provision of vitally needed educational services (including preschool education, special education, compensatory education, vocational education, education of gifted and talented children, and dual enrollment programs) not available in sufficient quantity or quality, and to stimulate and assist in the development and establishment of exemplary elementary and secondary school programs (including the remodeling, lease, or construction of necessary facilities) to serve as models for regular school programs.
2. For the support of demonstration projects by local educational agencies or private educational organizations designed to improve nutrition and health services in public and private elementary and secondary schools serving areas with high concentrations of children from low-income families. Such projects may include payment of the cost of (a) coordinating nutrition and health service resources in the areas to be served by a project, (b) providing supplemental health, mental health, nutritional and food services to children from low-income families when the resources for such services available to the applicant from other sources are inadequate to meet the needs of such children, (c) nutrition and health programs designed to train professional and other school personnel to provide nutrition and health services in a manner which meets the needs of children from low-income families for such services, and (d) the evaluation of projects assisted with respect to their effectiveness in improving school nutrition and health services for such children.
3. For strengthening the leadership resources of state and local educational agencies and for assisting those agencies in the establishment and improvement of programs to identify and meet educational needs of states and of local school districts.
4. For making arrangements with the local educational agencies for the carrying out by such agencies in schools which (a) are located in urban or rural areas, (b) have a high percentage of children from low-income families, and (c) have a high percentage of such children who do not complete their secondary school education, of demonstration projects involving the use of innovative methods, systems, materials, or programs, which show promise of reducing the number of such children who do not complete their secondary school education.

The 15 percentum set aside in Title III is extended to the entire consolidation:

> that not less than 15 percentum of the amount received pursuant to section 401(b) (the consolidation) in any fiscal year . . . shall be used for special programs or projects for the education of children with specific learning disabilities and handicapped children . . . . (*Sec. 403(a)(8)(B)*)

VOCATIONAL EDUCATION AMENDMENTS OF 1968 (P.L. 90-576)

Title I—Vocational Education

The Vocational Education Act provides that 10% of funds for vocational education must be spent for the handicapped (*Sec. 122*). This program is designed to provide an effective vocational education program for the handicapped and to develop new programs relating to the vocational education needs of the handicapped. A National Advisory Council on Vocational Education is created and must have one member of the council "experienced in the education and training of handicapped persons." State advisory councils on vocational education are also required to have a member "having special knowledge, experience, or qualifications with respect to the special educational needs of physically or mentally handicapped persons." Members are to be appointed by the elected state boards of education or by the governor (*Sec. 104*).

The vocational education program operates through an approved state plan with 50% matching state funds (*Sec. 103*).

Vocational education is defined in the following manner:

> The term "vocational education" means vocational or technical training or retraining which is given in schools or classes (including field or laboratory work and remedial or related academic and technical instruction incident thereto) under public supervision and control or under contract with a State board or local educational agency and is conducted as part of a program designed to prepare individuals for gainful employment as semiskilled or skilled workers or technicians or subprofessionals in recognized occupations and in new and emerging occupations or to prepare individuals for enrollment in ad-

vanced technical education programs, but excluding any program to prepare individuals for employment in occupations which the Commissioner determines, and specifies by regulation, to be generally considered professional or which requires a baccalaureate or higher degree; and such term includes vocational guidance and counseling (individually or through group instruction) in connection with such training or for the purpose of facilitating occupational choices; instruction related to the occupation or occupations for which the students are in training or instruction necessary for students to benefit from such training; job placement; the training of persons engaged as, or preparing to become, teachers in a vocational education program or preparing such teachers to meet special education needs of handicapped students; teachers, supervisors, or directors of such teachers while in such a training program; travel of students and vocational education personnel while engaged in a training program; and the acquisition, maintenance, and repair of instructional supplies, teaching aids, and equipment, but such term does not include the construction, acquisition, or initial equipment of buildings or the acquisition or rental of land (*Sec. 108*).

EDUCATION OF THE GIFTED AND TALENTED (P.L. 93-380, Title IV, Section 404)

The Act provides for the establishment of (a) an administrative unit in the Office of Education to coordinate the programs and activities for gifted and talented children provided for in the Act and (b) a national clearinghouse to collect and disseminate information relative to the education of gifted and talented children. In addition, the Commissioner is authorized to transfer funds to the National Institute of Education to conduct research relating to the education of gifted and talented children.

The Act provides for grants to state and local educational agencies for the development, operation, and improvement of programs and projects designed to meet the special educational needs of gifted and talented children at the preschool, elementary, and secondary levels. Funds may be used for the acquisition of instructional equipment, for training programs, and for model programs and projects. Funding of $12,250,000 is authorized for these programs, for each year through fiscal 1978. (See full statute and federal definition of gifted and talented children elsewhere in this section.)

HIGHER EDUCATION AMENDMENTS OF 1972 (P.L. 92-328)

The Commissioner of Education may make grants and contracts with institutions of higher education, including institutions with vocational and career educational programs, or a combination of such institutions, public and private organizations and agencies including professional and scholarly associations and, in the exceptional cases, secondary schools and secondary vocational schools, to plan, develop and carry out services to assist youths from low-income families with academic potential but who may lack adequate secondary school preparation or who may be physically handicapped to enter, continue, or resume postsecondary education. These programs include "Talent Search" to:

1. Identify qualified persons of financial or cultural need who have exceptional potential for secondary training and encourage them to complete secondary school and undertake such postsecondary training.
2. Publicize existing student financial aid.
3. Encourage secondary or postsecondary dropouts of demonstrative aptitude to reenter educational programs.

Also included is "Upward Bound" designed to generate skills and motivation necessary for postsecondary educational success. Participants in Upward Bound participate on a substantially fulltime basis during all or part of the program.

"Special Services for Disadvantaged Students" provides remedial and other special services for students with academic potential enrolled in or accepted for enrollment at the institution which is the beneficiary of the grant or contract and who because of a deprived educational, cultural, or economic background, or a physical handicap need these services to enable them to begin, continue, or resume postsecondary education.

Up to 75% of the costs of establishing and maintaining Educational Opportunity Centers are provided to serve areas with major concentrations of low-income populations by providing in cooperation with the other applicable programs and services:

1. Information regarding financial and academic assistance.
2. Assistance to persons applying to postsecondary institutions, including preparing necessary applications.
3. Counseling and tutorial services and any other necessary services to persons attending such institutions.

These centers will also serve as recruiting and counseling pools to coordinate resources and staff efforts of higher education and other postsecondary institutions in admitting educationally disadvantaged persons.

Persons participating on a substantially full-time basis in any of the above programs may receive a stipend of up to $30 monthly (*Sec. 417B*).

Loans are provided to college and university students. Full forgiveness is authorized on loans made to students who later teach handicapped children "in a public or other nonprofit elementary or secondary school system." The rate of forgiveness is 15% for the first or second year of such service, 20% for the third or fourth year, and 30% for the fifth year (*Sec. 465*).

Title V—Education Professions Development

The Act establishes a National Advisory Council (*Sec. 502*) and empowers the Commissioner of Education to make grants to or contract with state or local organizations to attract qualified persons into the field of education (*Sec. 504*).

Fellowships leading to advanced degrees are authorized for teachers and related education personnel including persons in "child development and special education for handicapped children" (Sec. 521).

The Commissioner is authorized to make grants to institutions of higher education, state educational agencies, and local educational agencies to conduct programs or projects including the following activities:

1. Programs or projects to train or retrain teachers, or supervisors or trainers of teachers, in any subject generally taught in the schools.
2. Programs or projects to train or retrain other educational personnel in such fields as guidance and counseling (including occupational counseling), school social work, child psychology; remedial speech and reading, child development, and educational media (including educational or instructional television or radio).
3. Programs or projects to train teacher aides and other nonprofessional educational personnel.
4. Programs or projects to provide training and preparation for persons participating in educational programs for children of preschool age.
5. Programs or projects to prepare teachers and other educational personnel to meet the special needs of the socially, culturally, and economically disadvantaged.
6. Programs or projects to prepare teachers and other educational personnel to meet the special needs of exceptionally gifted students.
7. Programs or projects to train or retrain persons engaging in programs of special education for the handicapped.
8. Programs or projects to train or retrain persons engaging in special educational programs for children of limited English speaking ability.
9. Programs or projects to provide inservice and other training and preparation for school administrators.
10. Programs or projects to prepare artists, craftsmen, scientists, artisans, or persons from other professions or vocations, or homemakers to teach or otherwise assist in programs or projects of education on a long term, short term, or part time basis (*Sec. 531*).

Authorized grants or contracts may be used to pay the cost of short or long term institutes and other preservice and inservice training programs designed to improve the qualifications of persons entering or re-entering elementary and secondary education or postsecondary vocational education (*Sec. 531*).

Any state desiring to receive grants is required to submit a state plan through its educational agency (*Sec. 520*).

SCHOOL ASSISTANCE IN FEDERALLY AFFECTED AREAS (SAFA OR "IMPACT AID")

P.L. 81-874 (As amended by P.L. 93-380)

This is a longstanding federal education component, first authorized by the 81st Congress. SAFA provides aid for the maintenance and operation of any of the nation's school districts which have received the impact of the presence of federal installations. The original purpose was to reduce the inequities to local school districts brought about by the presence of federal lands which are tax exempt coupled with that district's responsibility of providing an education to the dependents of federal employees, whether the dependents themselves live on federal property or whether their parents are simply in the federal employ, civilian and military.

In what is undoubtedly the closest approximation to general aid to education on the part of the federal government, payments are based on local education costs coupled with the number of federal dependents residing in a given local school district. Payments are made directly to the local school districts and may be expended for a relatively wide range of educational purposes.

P.L. 93-380 provides (Sec. 305(d)(C)) that, for the purpose of computing the amount to which a local educational system is entitled for any fiscal year under the impact aid program, the Commissioner shall count as one-and-one-half any child who is handicapped if that child is the dependent of a member of the US Armed Services. Such child shall be counted only when the recipient local educational agency is in fact providing a program designed to meet the special educational and related needs of such child. Handicapped children are defined in the same manner as defined by Section 602(1) of P.L. 91-230, and children with specific learning disabilities are also eligible as defined by Section 602(15) of the same P.L. 92-230.

P.L. 93-380 more specifically provides that programs provided by local education agencies for eligible children must be of sufficient size, scope, and quality as to give reasonable promise of substantial progress toward meeting the special educational needs of such children. The determination of size, scope, and quality is based upon the individual state's standards for certification of such programs, and each state must in fact certify the particular programs.

DEVELOPMENTAL DISABILITIES SERVICES AND FACILITIES CONSTRUCTION AMENDMENTS OF 1970
(P.L. 91-517)

The Act amends the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 (P.L. 88-164) to assist the states in developing a plan for the provision of comprehensive services to persons affected by mental retardation and other developmental disabilities originating in childhood, to assist the states in the provision of such services in accordance with such plan, and to assist in the construction of facilities to provide the services necessary to carry out such plans.

Title I, Services and Facilities for the Mentally Retarded and Persons with other Developmental Disabilities: Defines such disabilities as those attributable to mental retardation, cerebral palsy, epilepsy, or another neurological handicapping condition of an individual to which the following criteria apply: (1) the disability originates before such individual attains age 18; (2) the disability can be expected to continue indefinitely, and (3) the disability constitutes a substantial handicap to the individual.

The term "services" means specialized services or special adaptions of generic services directed toward the alleviation of a developmental disability and includes "diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, training education, sheltered employment, recreation, counseling of the individual with such a disability, and with his family protective and other socio-legal services, information and referral services, follow-along services and transportation services." (*Sec. 140*)

The following grants are authorized:

"(1) Grants to assist the states in developing and implementing a comprehensive and continuing plan for meeting the current and future needs for services to persons with developmental disabilities.

"(2) Grants to assist public or non-profit private agencies in the construction of facilities for the provision of services to persons with developmental disabilities including facilities for any purpose stated in this section.

"(3) Grants for provision of service to persons with developmental disabilities including costs of operation, staffing and maintenance of facilities for persons with developmental disabilities.

"(4) Grants for state or local planning, administration, or technical assistance relating to services and facilities for persons with developmental disabilities.

"(5) Grants for training of specialized personnel needed for the provision of services for persons with developmental disabilities, or research related thereto.

"(6) Grants for developing or demonstrating new or improved techniques for the provision of services for persons with developmental disabilities." (*Sec. 130*)

A national advisory council is created to advise the Secretary of Health, Education, and Welfare and to evaluate the effectiveness of programs. Membership of the council will consist of 20 leaders in the fields of service to the mentally retarded and other developmentally disabled persons. (*Sec. 133*)

The formula grant program of the Act operates through two main mechanisms at the state level: (1) The State Planning and Advisory Council, and (2) designated state agencies.

Membership on the state advisory councils is to include representatives of each of the principal state agencies, local agencies, and nongovernmental organizations and groups concerned with services for the developmentally disabled.

At least nine specific programs must be taken into account: vocational rehabilitation, public assistance, social services, crippled children's services, education for the handicapped, medical assistance, maternal and child health, comprehensive health planning, and mental health. Provision in the state plan must include special financial and technical assistance for areas of urban and rural facility for persons with developmental disabilities. (*Sec. 134*)

Title II, Amendments to Part B of the Mental Retardation Facilities Construction Acts: A program is provided for federal support of interdisciplinary training in institutions of higher learning as well as for the construction of facilities to house these programs. Grants may be made to assist university affiliated facilities in the construction of special facilities capable of demonstrating exemplary care treatment, education, and rehabilitation of the developmentally disabled. These grants may cover the costs of administering and operating demonstration facilities and interdisciplinary training programs for personnel with developmental disabilities. (*Sec. 122*) Priority consideration will be given to projects involving junior colleges in training programs. (*Sec. 203*)

Project grants to the states are authorized to assist in the construction of public or non-profit facilities to provide a wide array of services to the developmentally disabled. (*Sec. 201*)

THE DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT OF 1974 (P.L. 94-103)

This act made a number of significant amendments to the basic Act just discussed.

- The definition of the term *developmental disability* was broadened to include autism and dyslexia; however, only dyslectic children and adults who *also* suffer from mental retardation, cerebral palsy, or autism are to be eligible for services.
- The authority for formula grants to the states was extended for three additional years.
- The authority for demonstration and training grants to university affiliated facilities was continued for 3 years (authorization levels: $15 million in fiscal year 1976, $18 million in fiscal 1977, and $25 million in fiscal 1978). A portion of increased grant funds (above $5 million) must be set aside for feasibility studies and operating support of satellite centers in states without university affiliated programs.
- A new funding authority was added to assist in renovating and modernizing university affiliated facilities. There was $3 million authorized for each of 3 fiscal years for the program.
- A new special project authority was included in the legislation.
- Numerous changes were made in state plan requirements including: (a) reduction in the maximum percentage of a state's allotment which may be obligated for construction purposes (from 50% to 10%); (b) a requirement that the state plan incorporate a deinstitutionalization and institutional reform plan (not less than 10% of the state's allotment must be obligated for this purpose in fiscal 1976 and 30% in succeeding fiscal years); (c) provision for the state planning council to review and comment on all state plans affecting the developmentally disabled, to the maximum extent feasible; and (d) provision for protecting the interests of employees in any deinstitutionalization plans.
- A requirement that all Developmental Disabilities grantees take affirmative action to employ and advance qualified handicapped individuals.
- A directive to the Secretary of HEW to develop a comprehensive performance based system for the evaluation of services provided to developmental disabled persons within 2 years after the enactment of the legislation. States must implement the system within two years after its promulgation by the Secretary.

Title II

In addition to changes in the existing Developmental Disabilities program, this legislation added a new Title II designed to protect the rights of developmentally disabled individuals. Highlights of this new Title include:

- A Congressional finding that "persons with the developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities."
- Incorporation of a list of minimum standards

for the operation of residential facilities for the developmentally disabled including (a) provision of a well balanced diet, (b) provision of sufficient medical and dental treatment, (c) prohibitions against the use of chemical and physical restraints, (d) provision for reasonable visiting hours, and (e) compliance with adequate fire and safety standards. The legislation also calls for "comprehensive" residential programs to meet standards equivalent to the federal intermediate care standards applicable to mental retardation facilities, to the extent that such standards are appropriate considering the size and service delivery arrangements of the facility. Other residential facilities are expected to meet the needs of its residents and provide humane and sanitary care in an environment which safeguards the residents' rights. Nonresidential programs are to be appropriate to the needs of its clients.

- A requirement that all Developmental Disabilities funded programs must have individualized habilitation plans on every client served in the program. These plans must be reviewed and updated annually and must meet the minimum specifications included in the legislation.
- A provision requiring all states to develop a system for protecting and advocating the rights of developmentally disabled persons by October 1, 1977. Any state which fails to have such a system in operation by that date will be ineligible to receive its Developmental Disabilities allotment. There is $3 million authorized in each of the next 3 fiscal years to assist states in developing such protective service and advocacy systems.
- A provision directing the Secretary to review and evaluate standards and quality assurance mechanisms under existing federal programs affecting the developmentally disabled and make recommendations for rationalizing and improving such requirements. His recommendations, which must be based on performance criteria for measuring and evaluating the developmental progress of disabled persons, must be submitted to Congress within 18 months after enactment of the legislation.

Title III

Finally, a new Title III of the bill directs the Secretary to forward to Congress, within 6 months after enactment of the legislation (and annually thereafter), his recommendations on conditions which should be included in the term *developmental disabilities.* He also must commission an independent contractual study of the appropriateness of the current definition, recommendations for revisions in the definition, and the adequacy of services to excluded disabled groups. The final report of this study must be submitted to Congress within 18 months of the date of enactment of the first appropriations bill including funds for the study.

ADULT EDUCATION (P.L. 91-230, TITLE III) (As Amended by P.L. 93-380, Title VI, Part A, Section 603)

The Adult Education Act of 1966 was created to establish and expand programs of adult public education aimed at encouraging adults to complete their education through the secondary level. The Act is more specifically aimed at helping adults prepare for more profitable employment and for more responsible citizenship. Due to constrained appropriations since the passage of the Act, funds have been focused on providing adult basic education programs for those who have not achieved the level of an eighth grade education. Grants are made to the states on the basis of an approved state plan.

P.L. 93-380 (Title VI, Part A, Sec. 603) amended the Adult Education Act in such manner as to provide that not more than 20% of the funds under the Act can be applied to educational programs for institutionalized persons. The legislative history accompanying this amendment defines "institutionalized adults" as "those adults incarcerated in Federal, State and local penal institutions and those adults residing in Federal, State and local institutions for the mentally and physically handicapped."

AN ACT TO PROMOTE THE EDUCATION OF THE BLIND (1879)

The Act creates the American Printing House for the Blind, a nonprofit institute located in Lexington, Kentucky, which supplies educational materials and tangible apparatus to blind and multiply-handicapped children and adults.

The Act establishes a perpetual fund, the interest of which the Secretary of HEW is authorized to pay to the trustees of the Printing House on a semi-annual basis (Sec. 2). The appropriation shall be expended by the trustees each year "in manufacturing and furnishing books and other materials specially adapted for the instruction of the blind." These materials "shall each year be distributed among all the public institutions in the states, territories, and possessions of the United States, the Commonwealth of Puerto Rico and the District of Columbia, in which blind pupils are educated" (*Sec. 3*).

The superintendent of each public institution for the education of the blind (or his designee) and the chief state school officer shall serve as ex-officio members of the board of trustees of the American Printing House for the Blind (*Sec. 3*). The trustees are required to make an annual report to the Secretary of the Treasury (*Sec. 4*).

GALLAUDET COLLEGE (P.L. 83-420)

The Act changes the name of the Columbia Institution for the Instruction of the Deaf and Dumb and Blind, Incorporated, to Gallaudet College, located in Washington, D.C. It is a private, nonprofit educational institution providing an undergraduate and graduate program for the deaf, a preparatory school for deaf students, a graduate school program in the field of deafness and adult education for deaf persons (*Sec. 2*). It operates the Kendall School for Deaf Children, a preschool program for very young deaf children, and programs in research on deafness.

The Act defines the corporate powers of Gallaudet College and provides for its organization and administration (*Sec. 6*). Gallaudet College "shall be under the direction and control of a board of Directors, composed of thirteen members" (*Sec. 5*).

The Act authorizes the appropriation of such sums

> as the Congress may determine necessary for the administration, operation, maintenance, and improvement of Gallaudet College, including sums necessary for student aid and research, for the acquisition of property, both real and personal, and for the construction of buildings, and other facilities for the use of said corporation. (*Sec. 8*)

MODEL SECONDARY SCHOOL FOR THE DEAF ACT (P.L. 89-694)

The Secretary of HEW is authorized to enter into an agreement with Gallaudet College to establish the Model Secondary School for the Deaf, serving primarily the residents of the District of Columbia and nearby states. The high school will provide a model for the development of similar programs across the country in formulating new educational methods, technology, and curriculums.

The HEW agreement with Gallaudet shall (a) provide for utilization of the National Advisory Committee on Education of the Deaf to advise Gallaudet on the establishment and operation of the model secondary school, (b) provide an annual report to the HEW Secretary, and (c) provide excellence in architectural design in construction of any facilities along with innovative auditory and visual devices (*Sec. 4*).

Such sums necessary for the establishment and operation, including construction and equipment, of a model secondary school "are authorized to be appropriated for each fiscal year" (*Sec. 2*).

NATIONAL TECHNICAL INSTITUTE FOR THE DEAF ACT OF 1965 (P.L. 89-36)

The Act authorizes the construction and operation of a residential facility for post secondary technical training and education for persons who are deaf in order to prepare them for successful employment (*Sec. 2*). Preference will be given to the institute being located in a large metropolitan area having a wide variety of representative industries available for training experience (*Sec. 5*). The institute will be affiliated with a major university for the administration of its program (*Sec. 4*). The governing body of the institution is required to make an annual report to the Secretary (*Sec. 5*). (The National Technical Institute for the Deaf is located at Rochester Institute of Technology in Rochester, New York.)

PATRIA G. FORSYTHE

Progress for the Severely Handicapped

□ The ancient Greeks defined an idiot as a person who lived apart from his fellow man.

People are learning that persons who are severely handicapped, as well as those with other developmental disabilities, are entitled to be treated as individual human beings with basic rights. They are not for "warehousing." When walls are erected around them, their problems are not solved, but become more severe.

They are people. Although "severely handicapped" might be defined in technical terms in several ways (none of them precise), it is a relative term. Given the chance, retarded persons develop physically, socially, and intellectually like everyone else; not given the chance, they deteriorate.

Much has happened in developmental disabilities during the past 15 years. Organizationally, one might say, the country is ready to do some accelerated work on behalf of severely handicapped persons, and certainly, the knowledge for this work is not lacking.

It was 36 years ago—in 1939—when a man named Harold M. Skeels walked into the annual meeting of the American Association on Mental Deficiency in Chicago carrying a paper that reported the effects of environmental stimulation—or lack of it—on the mental development of children. He believed that cultural deprivation was a cause of mental retardation; it was, for that time, a radical idea. Three years later, he issued a follow-up report, and in 1966 Skeels reported on the same group over a span of 30 years.

He studied the mental development of 25 children. All were infants or of preschool age; all were wards of a state institution for dependent children; 20 were illegitimate. Most of their parents had been school dropouts and were generally on the lower end of the economic scale.

From this homogeneous background, two contrasting patterns emerged. Thirteen children who had shown *marked retardation* in infancy were judged to be of normal intelligence by middle childhood. "As adults," said Skeels, "these 13 individuals have continued to show at least average or better than average achievement as indicated by education, occupation, income, family adjustment, intelligence of their children, and contributions to the community." The developmental trend had been reversed by planned intervention, which included placing them in homes which provided love and normal life experiences.

What of the others? Twelve children who had been within the *normal range* in infancy showed such decline in rate of mental growth that by middle childhood, they were judged to be mentally retarded. This group had remained in the nonstimulating, emotionally barren environment of the original institution through childhood.

These 12 children had been selected because at the ages of 12 to 20 months, they had initially been of normal intelligence. By the age of six years there was an average loss of 26 points in IQ as compared with initial tests. A followup study showed that in spite of a small rise in IQ (associated with entrance to school), the children were still mentally handicapped. Nine of the 12 were remanded to institutions for the mentally retarded. One died in adolescence; one has become self sufficient at a middle class level; the rest are either in institutions or minimally employed.

Skeels felt that most of the children in both groups, had they been placed in suitable adoptive homes or the equivalent in early infancy, could have achieved within the normal range of development. This becomes even more significant when it is realized that the large majority of persons called retarded are only mildly retarded.

DYNAMICS OF INSTITUTIONALIZATION

The Willowbrook (NY) case is still in the foreground of many people's consciousness, although the indignities suffered by retarded youngsters there have occurred elsewhere. But this sad story should be remembered the way "we remember Pearl Harbor," because there are just as many lives involved. One of the strong impacts of Willowbrook has been the additional recognition from the courts that lack of meaningful help can be as damaging as overt cruelty in turning children into vegetables.

When Judge Judd of the District Court approved a consent decree in April 1975 securing the constitutional rights of the Willowbrook residents to protection from harm, he added a memo of his own. He said, "The consent judgment reflects the fact that protection from harm requires relief more extensive than this court originally contemplated, because harm can result not only from neglect but from conditions which cause regression or which prevent development of an individual's capabilities."

He accepted the argument of plaintiffs that in an institution for the mentally retarded, it is impossible for the condition of a resident to remain static. If his functioning is not improving, it will deteriorate. Thus, to keep the residents from being harmed, it may well be necessary to provide the full range of affirmative relief, which has been ordered in some court cases under a theory of right to treatment.

To insure safe custody, the theory of right to protection from harm has developed as set forth in 1973, based on the 8th Amendment to the Constitution: prohibition against cruel and unusual punishment. To insure habilitation, the theory of right to treatment has developed, based on the 14th Amendment of the Constitution and related to the clauses on equal protection and due process. So much for legal precedent; it helps turn good intentions into deeds.

There has been strong new interest in the total quality of life rather than in merely the length of life, strong new interest in the positive elements of good health rather than in merely the absence of disease and infirmity. Such interests are reflected in the work now going on throughout the country to make it possible for severely handicapped individuals to lead fuller lives.

More emphasis is placed on proper diet, especially during the younger years, as well as on the need for vaccination against rubella and other diseases. The school system is making education available to everyone, including severely handicapped children. This includes academic, vocational, and social skills which enable them to live up to their greatest potential. Recreation (a word whose origin is *re-creation)* is no longer busy work filling empty hours but an end in itself which provides not only therapy but many kinds of satisfaction. The physical environment finally has been recognized as important, and a handicapped person's relationship to his environment now is a major concern of architects, urban planners, behavioral scientists, and social workers.

PROBLEMS OF DEINSTITUTIONALIZATION

On the one hand, there are efforts to enrich the lives of persons who must remain in institutions, and on the other hand to make it possible for many persons in institutions to someday return to relatives and friends in a home environment. Deinstitutionalization has become a major objective of government. By 1980, a reduction of one third of the mentally retarded persons now living in institutions is to be effected. This takes planning, of course, and the normalization corollary is to have adequate supportive services in the community.

The new Developmental Disabilities Office (DDO), which recently became a separate agency in HEW's Office of Human Development, is coordinating this planning effort with the state DD councils. The state councils are the target groups, because they are both the planners and advocates for this group of disabilities.

DDO grants money to states provided there are state plans to make use of existing resources in helping people with developmental disabilities—education, rehabilitation, medical, welfare, and the like; in these instances where resources are not available, federal funds can be used to fill gaps.

The Developmental Disabilities Act specifies, "The state plan will describe how federal funds allotted to the state will be used to complement and augment rather than duplicate or replace services and facilities for the developmentally disabled which are eligible for federal assistance under other state programs." Emphasis on using what is already on hand has its organizational problems, such as "co-mingling of funds," but it does reduce cost greatly, and serves more people.

At the state level, there are three problems in planning for the use of existing resources: lack of information and a system for storing it; lack of staff and the analytic ability to assess the data; interorganizational problems. At the local level, problems of manpower can be turned to good advantage. Involving people can widen the base of support in the community and make it easier to solve the complicated problems of the severely handicapped.

The right of everyone to be well nurtured, well brought up, and well educated has been affirmed since the first White House Conference on Children and Youth. Though society increasingly tries to ensure this right, for many years there will remain people to whom this has been denied and for whom society must provide both intervention and restitution.

REFERENCE

New York State Association for Retarded Children versus Rockefeller and *Parisi v. Rockefeller*, Case Nos. 72C-356 (E.D.N.Y. filed March 17, 1973) and 72C-357 (S.D.N.Y. 1972).

JOSEPH J. MARINELLI

Financing the Education of Exceptional Children

□ Public policy, from all levels of government, is mandating the provision of appropriate programs for all exceptional children. The scope of these policy mandates is extensively discussed throughout this book. However, reality dictates that in order for the needs of exceptional children to be met, attention must be directed to issues surrounding the provision of required financial support.

It is the purpose of this chapter to provide an overview of knowledge and issues in special education finance. The chapter is divided into five parts. The first part examines the environmental factors affecting the financing of special education. Special attention is given to the dynamic interplay between general and special education finance. The second part explores the costs of providing programs and services for exceptional children, including types of costs and methodologies for cost analysis.

The third part examines the patterns by which funds are distributed by federal and state levels of government to agencies providing services, and the effect such patterns have on programing for children. The fourth part examines the role that each level of government plays in providing the necessary resources for special education.

Finally, sufficient economic resources must be allocated to educational delivery systems for the purchase of adequate and appropriate human and material resources. These resources must be combined in an efficacious manner to ensure that the needs of exceptional children are met and their rights guaranteed. The last part introduces a program-planning-budgeting format to maximize resources. It brings together the substantive aspects of special education finance examined in earlier parts of this chapter and channels them into a process for financing special education.

I: ENVIRONMENTAL FACTORS AFFECTING THE FINANCING OF SPECIAL EDUCATION

Special education does not operate in a vacuum, but rather within the complex formal institution of education. Consequently, it is as affected by the environment external to education as are other components of schooling. Those external factors may be categorized as demographic, social, legal, economic, and political. Each factor interacts with and affects the others and initiates cause-effect relationships within the educational system. These factors may be international, national, state, or local in scope. Nonetheless, knowledge of, beliefs about, attitudes toward, expectations of, and commitments to an educational system are, in part, a function of these external factors. Together these factors control the amount of and manner in which resources are made available to an educational system and the manner in which they may be spent.

The nature of the financing of special education is itself a function of those external factors in concert with factors internal to the educational system. Together they control the student population and needs of special education, the amount of funds made available to special education, and the manner in which those funds are allocated and expended.

Musmanno (1975) recognized the complex nature of school finance:

> While examining external aspects of financing education, it becomes apparent that the subject cannot be uprooted from its political and sociological bases. There is simply no area that can be designated as pure school finance. (p. 99)

Philosophies espoused in the external environment do not necessarily exist in harmony. For example, a social objective inherent in our democratic ideal is that of "equalizing educational opportunity." This objective is generally viewed as in conflict with the economic philosophy of capitalism. The conflict requires a political or judicial resolution. A question frequently asked is, Should an exceptional child or any child for that matter, because he or she resides in a "poor" school district which cannot generate sufficient revenues from its low tax base, suffer from an inferior education? A pure capitalist would answer by saying that "a man is entitled to the fruits of his labor, a corporation to its profits, a school district to revenue produced from its tax base" (Musmanno, 1975, p. 97). Thus, in the pure capitalist view, wealth should not be redistributed. This is but one example of the relationships which exist between demographic, social, legal, economic, and political factors and their consequences for education.

DEMOGRAPHIC AND SOCIAL FACTORS

Demographic and social factors have an impact on both the nature and number of students enrolled in the public schools. In addition, the general public or subpublics hold attitudes toward various identifiable subgroups of children enrolled in schools. Educational objectives are established for those children with those attitudes in mind. The nature and number of children impact upon educational needs, which in turn affect educational costs of programs and services designed to satisfy those needs. Demographic and social factors include the distribution and characteristics of the population, socioeconomic composition, and social attitudes and objectives.

Distribution of the Population, District Size, and Economies of Scale

The rural to urban shift has had a profound effect on the capability of school governing units in both rural and urban areas to finance special education programs. The average cost for the education of an exceptional child declines as the size of an education organization, as measured by student enrollment, increases. At some point, however, the average cost begins to rise again due to what is believed to be the difficulty in operating large organizations efficiently. This is true of all economic activity and the U shaped phenomenon is known as *economies of scale*.

In school districts with a small enrollment, although the percentage of exceptional children may be the same as in large districts, the number of handicapped children will be less. In order to serve the needs of all exceptional children, a teacher skilled in each area of exceptionality must be available. In districts where the number of students in a particular category of exceptionality is less than the maximum number of students that could appropriately be served by one teacher, the cost per pupil is very high. A small district may have identified only two students as trainable mentally retarded, whereas a larger district may have identified ten children. Both districts will require the services of one teacher, for a teacher is not divisible into smaller units. As populations in rural areas have declined, some of these difficulties have become substantial.

The increase in the student population of urban areas has increased faster than urban centers could accommodate new students, many of whom were exceptional and disadvantaged. It is also argued that many parents moved to urban areas so that their offspring could receive costly special educational and supplementary programs and services unavailable in sparsely populated areas.

Since many services for exceptional children are not available in rural areas, particularly for children possessing low incidence exceptionalities, major business, industries, and the military may transfer personnel to areas where appropriate services are available. The result is a skewed population of exceptional pupils (Gray, 1973). Consequently, per capita costs have also risen in urban and suburban school districts.

Education is a labor intensive industry, as evidenced by the fact that 80 to 85% of all funds for education are used to purchase the services of personnel. Traditional systems of state educational financing have either not recognized, or not recognized adequately, the higher educational cost per exceptional pupil and thus have not made sufficient funds available. Couple the above with the low priority which had, until recently, been placed on serving the educational needs of the exceptional child, and it is no wonder that the exceptional child has been inappropriately served or excluded from an education altogether.

In order to adequately serve the needs of children, school districts have entered into cooperative arrangements, intermediate school governing units have been organized to provide services to children in several districts, and state governments have reduced the number of districts in a state through consolidation.

Other Characteristics of the Population

Various population characteristics affect educational finance. In addition to rural to urban mobility already discussed, declining birth rates and socioeconomic composition have significant effects.

Declining birth rates and underdeveloped markets. In recent years the birth rate has been declining so that, at present, the low point of the age distribution is in the elementary school years. A 1972 US Bureau of Census projection (American Association of School Administrators, 1974) estimated that elementary school enrollment will continue to decline through 1985. The decline will not severely affect secondary schools until the early 1980's, and the decline will continue throughout the decade. These projections, however, are based on current nationwide retention ratios of the number of children moving through the grades in previous years. Changes in local or national social, cultural, economic, or demographic conditions would alter these projections.

In some communities the decline in birth rate has and will continue to necessitate the closing of schools where the operation of such schools is inefficient due to low enrollment. In other communities the in-migration of students will be sufficient to maintain current levels of enrollment or will continue to cause increased enrollments.

Some educators have hailed declining school enrollment as an opportunity to capitalize on underdeveloped student markets. At current levels of educational funding, assuming budgets are at least increased to compensate for rises in the cost of living, monies and the school resources they purchase would be available to develop the productivity of previously unserved or inappropriately served identifiable student groups. Exceptional children are a prime example of an underdeveloped market in education. Through the use of economic tools of analysis, it can be shown that the benefits to society of reducing the dependence of handicapped children on others and making them wage earners and taxpayers outweigh the costs to accomplish this over the lifetime of these citizens, depending on the nature and extent of the handicap.

Socioeconomic composition, educational needs of exceptional children, and educational costs. Changes in the type and quantity of resources needed to operate educational programs and services can be linked to changes in the socioeconomic composition of the American population such as the following (Johns & Alexander, 1971):

1. The increasing number of families dependent on public assistance.
2. The large groups of youth of all ages who, for a variety of reasons, have serious emotional and learning difficulties.
3. The substantial proportion of the normal working population in the 25–64 age group that undergoes occupational readjustment resulting primarily from technological changes.
4. The increasing proportion of the population over age 65.

In this case factor 2 above is important. Approximately 10% to 15% of children have a wide range of emotional and learning difficulties stemming from handicapping conditions (US Congress, 1973). These children require costly remedial or supplementary services.

Middle and upper income groups are producing fewer offspring, but large families are still found among low income groups. Since there is a relationship between poverty and prevalence of handicapped offspring, it can be expected that the percentage of handicapped children in the school population will rise. It has been shown that adequate nutrition and medical care at a child's critical developmental stages, beginning at the prenatal stage, are important for normal development of the nervous system and cognitive abilities. Yet a scarcity of proper food and medical care exists among the poor. Thus it is not unexpected to find higher incidences of handicapped youth in rural and inner city areas.

A landmark study by Rossmiller, Hale, and Frohreich (1970) produced the cost index shown in Table 1 after comparing exemplary special education program costs with regular education program costs. The results of the study are generally consistent with subsequent studies.

There are an estimated 8 million handicapped children in the United States, one million of whom receive no educational services at all. Of those being served only 40% are presently receiving the services they need (US Congress, 1973). The information shown in Table 2 exemplifies the needs of handicapped children.

Table 1

Cost Index by Exceptionality

Category of exceptionality	*Cost index*
Gifted	1.14
Educable mentally retarded	1.87
Trainable mentally retarded	2.10
Auditorily handicapped	2.99
Visually handicapped	2.97
Speech handicapped	1.18
Physically handicapped	3.64
Neurological and special learning disorders	2.16
Emotionally disturbed	2.83
Multiply handicapped	2.73

Note. From *Educational Programs for Exceptional Children: Resource Configuration and Costs* (National Educational Finance Project Study No. 2) by R. A. Rossmiller, J. A. Hale, and L. E. Frohreich, Madison: Department of Educational Administration, The University of Wisconsin, 1970.

Table 2

Percentage of Handicapped Children Receiving Services

Type of handicap	*Percent of total served*
Trainable mentally retarded	4.9
Educable mentally retarded	24.7
Hard of hearing	1.8
Deaf	0.9
Speech impaired	45.4
Visually impaired	0.9
Emotionally disturbed	6.5
Crippled	4.2
Learning disabled	7.5
Other health impaired	3.1

Note. From *Services for Handicapped Youth: A Program Overview* by J. S. Kakalik, G. D. Brewer, L. A. Dougharty, and P. D. Fleischauer, Santa Monica, CA: Rand, 1973.

It has been estimated that the cost of serving all exceptional children in high quality programs by 1980 will rise to approximately $6 billion to $10.6 billion annually depending on one's projection of the number of exceptional children and on the inflation rate (Rossmiller et al., 1970).

Social Attitudes and Objectives

Social attitudes and objectives may be viewed locally and within a national context. Education is viewed as a mechanism to inculcate social attitudes and educational objectives which arise from those attitudes. Due to geographical, socioeconomic, and other differences, communities exercise different educational preferences. The degree to which educational programs and services vary rests upon those local preferences which may or may not be in harmony with state and national preferences. The preference will in part depend on whether there is a production or consumer emphasis; that is, whether economic investment in education is based on economic returns or on the noneconomic qualities of life (Johns et al., 1971).

Economic investment in the handicapped. Most handicapped children can be relied on to be productive members of society. Typically cost-benefit analysis is the economic technique employed to examine the productivity of an activity in order to choose among alternative ways of allocating resources. Decisions rest on whether total net dollar benefits are greater than the dollar value of total investment discounted to present value, or whether the benefit-cost ratio (B/C) is equal to or greater than 1. More simply, for each dollar invested at least one dollar is returned to the economy. In the case of investment in the education of people, benefit is measured as lifetime earnings, which enter the economic cycle of the personal expenditures of those educated (partly in taxes) and their personal income.

Conley (1973) has examined benefit-cost ratios of educational programs for the mentally retarded and observed the following:

1. The lifetime earnings of retarded workers are high. A mildly retarded male who entered the work force at age 18 in 1970 could expect lifetime earnings of over $600,000. This estimate assumed a 2.5% growth rate of productivity and is expressed in terms of 1970 prices. The present value of these earnings when discounted at 7% was $131,000. Among women and the moderately retarded these values were, of course, considerably lower.
2. Each dollar expended on the vocational rehabilitation of 18 year old mildly retarded adult males generates an estimated increase in future earnings of $14 in present value terms. The ratios declined among older retardates, women, and the more severely

retarded, but in all cases were equal to or greater than the critical value of 1, and in most cases, far above this value.

3. The lifetime educational costs of the mildly retarded were far below their estimated lifetime productivity, stated in present value terms, even if they attended special education classes for the entire time they were in school. These comparisons were much less favorable for the moderately retarded, although it is probable that the data underestimated their earning potential.
4. The custodial costs (those exclusive of normal consumption and developmental expenditures) of lifetime institutionalization of the retarded are almost $400,000 (1970 dollars). Prevention of institutionalization may be a significant part of the benefits of extending additional community services to the retarded.
5. A substantial share of the benefits of developmental expenditures on the retarded are received by taxpayers, in the form of reduced provision of public maintenance and increased tax payments, probably about one-half of their earnings.
6. The benefits of prevention are large. For each case of severe retardation among males that is averted, the undiscounted total gain to society is almost $900,000 (1970 dollars). For an 18 year old adult in 1970, this would have a present value of over $200,000.
7. Prevention is important. If all groups in society have the same percentage of persons with IQ's below 50 as upper and middle class white children, the prevalence of this level of retardation would decrease by almost 80%. In 1970 this would have meant an increase of about $800 million in the resources available to improve living standards.

Social reform movement and exceptional children. The rhetoric of quality education and equality of educational opportunity has existed as long as anyone can remember. Recently it has been reaffirmed by a number of bodies, including the President's Commission on School Finance (1972):

> The only reasonable and defensible public policy for communities, states, and the nation is to ensure to all children equal access to education that is good enough to meet their individual needs and the collective demands of a growing economy in a democratic society. (pp. 14, 15)

The commission went on to clarify what it meant by equality of educational opportunity. One should have "the equality of opportunity to perform to the limits of one's potential and to make a maximum contribution to the common good" (p. 15). Children come from various backgrounds which can either aid their self development or handicap them. The treatment of children with equal and similar education maintains or accentuates advantages and handicaps.

Educational practices must serve to build on a student's resources so that he may capitalize on his advantages, and it must provide special assistance to those who have handicaps which can be eliminated or which need to be coped with. Those with special needs will require more resources.

In order to accomplish equality of educational opportunity and provide quality education, reforms in educational finance are needed:

1. Revenue should be collected within the framework of an equitable tax structure and scarce resources should be distributed in new ways so that educational opportunity is not a function of the taxable wealth of the school district wherein the student resides.
2. State formulas for distributing school funds should recognize the differences in the educational needs of children, variations in program costs, and school district organization (economies of scale).
3. Sources of human and material waste and inefficiency should be examined so as to devise means to increase educational productivity. (In the economic sense, expenditures on education are an investment which requires the greatest possible returns.)

LEGAL FACTORS

The Rights of the Handicapped

As early as 1954, the Supreme Court, in *Brown v. Board of Education of Topeka,* said:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Despite this ruling, large numbers of handicapped children are still excluded from a public education, either through state law (*de jure*) or by practice (*de facto*).

Judicial rulings in recent years have made it clear that handicapped children of school age, regardless of the degree of mental, physical, or emotional disability, have a right to equal access to public education. The 14th Amendment to the US Constitution guarantees to all people due process of law and equal protection of the laws. In *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* (1971), in *Mills v. Board of Education of the District of Columbia* (1972), and in other cases, these rights have been applied to prevent the denial of public education opportunities to school age handicapped children who could benefit from such education.

Free Public Education for the Handicapped

Judicial rulings have ensured each handicapped child an equal educational opportunity by the provision of an appropriate education in a public or private institution to meet his or her potential *at full public expense notwithstanding the wealth of parents or guardians.* Federal legislation has echoed this right. Included in P.L. 93-380, the Education Amendments of 1974, is a section entitled "National Policy with Respect to Equal Educational Opportunity," which states:

> Recognizing that the nation's economic, political, and social security require a well educated citizenry, the Congress (a) reaffirms as a matter of high priority, the nation's goal of equal educational opportunity, and (b) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers. (Sec. 801, 88 Stat. 597 [1974], 20 U.S.C. 1221-1)

In the *Mills* (1972) case, the court dismissed the defendants' argument that there were insufficient funds to pay for the education of the plaintiffs by stating:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education . . . .
>
> The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

In the *PARC* (1971), *Mills* (1972), and *Lebanks v. Spears* (1973) cases, the courts ordered "free" and "public" education and training to assure that parents of handicapped children may not be required to contribute to the costs of the education of their children. State courts have also ruled uniformly that special education programs must receive full public support and that parents cannot be required to pay for portions of the costs of such programs. A New York court ruled:

> It would be a denial of the right of equal protection and morally inequitable not to reimburse the parents of a handicapped child for monies they have advanced in order that their child may attend a private school for the handicapped when no public facilities were available while other children who are more fortunate can attend public school without paying tuition and without regard to the assets and income of their parents. (*In Re K*, 1973)

> Furthermore, it is the child who is given the right to an education, not the parent, and his right should not be abridged or limited by the willingness of a parent to become financially liable for the education. To limit the right to an education in this manner would discourage many parents from seeking the appropriate facilities for their child.
>
> While at first blush this may seem like a substantial outlay of funds for one child, when compared with the dollar cost of maintaining a child in an institution all his life or on public assistance the cost is minimal; not to speak of the incalculable cost to society of losing a potentially productive adult. (*In Re Downey*, 1973)

Since most state constitutional provisions use words such as *free* or *without charge* in describing how the public education system shall be instituted, most ceiling limitations (i.e., maximum tuition reimbursement grants) placed on the state's financial liability for a child's education are susceptible to challenge under those state constitutional provisions in addition to their inadequacies under the federal Constitution.

Such Pennsylvania provisions are being challenged in federal court in *Halderman v. Pittinger:*

> The complaint charges that Pennsylvania's statutes and regulations violate the equal protection clause of the 14th Amendment because the arbitrary and capricious maximum tuition reimbursement grant discriminates against children certified to attend private schools when all other children have the opportunity for a free public education. In addition to this wealth discrimination, a further allegation is that the statutes and regulations violate the due process clause of the 14th Amendment because children whose par-

> ents are unable to supplement the tuition grant are deprived of any meaningful opportunity for appropriate education. Finally, the plaintiffs allege that the statutes and regulations violate the Rehabilitation Act of 1973 (87 Stats. 355), which forbids discrimination against any handicapped person in financial assistance. Such a violation is inconsistent with the Supremacy Clause, Article VI, of the United States Constitution.
>
> The plaintiffs are asking that the court (a) declare that the statutes in question violate the equal protection and due process clauses of the 14th Amendment; (b) enjoin the defendants from enforcing the statutes; and (c) order that full reimbursement be made for all plaintiffs insofar as they have been denied or withheld such reimbursement.
>
> The case is pending. (Abeson & Bolick, 1974, p. 30)

Equalization of Educational Opportunity and Finance Standards

Several standards for accomplishing equalization of educational opportunity have been considered by the courts (McDermott & Klein, 1974). Each judicial standard differentially affects the amount and nature of financial allocation formulas and local funds available to provide special education programs and services.

Equal dollars per child. No court has adopted this standard as legally required. In addition, it does not recognize variations in needs and costs and, in fact, may stifle local initiative and lead to a regression toward mediocrity.

Dollars adjusted according to pupil needs. The "needs only" standard was also rejected by one court, but it stressed the need for a flexible standard of proportional equality.

Lack of judicially manageable standards. This implies that courts have neither money nor power to allocate public monies to fit the different needs of students throughout a state. A standard, however, must permit expenditure variation.

Maximum variable ratio. This permits expenditure variation within a specified range with some financial flexibility in responding to local problems. It allows for local initiative.

Negative standards. In this case a definition of what educational opportunity is not is specified, such as "the quality of public education may not be a function of wealth other than the wealth of the state as a whole." This does not mean that fluctuations may not occur for reasons other than wealth.

Inputs. This standard specifies that equality must exist in the level of educational resources. They may vary in price, however, between school districts.

Outputs. The effects of different educational investments would be gauged in terms of pupil performance (output) on standardized achievement tests. Research results, however, have not been able to link disparities in expenditures with unequal educational opportunities.

Minimum adequacy. This standard was the one used by the majority of Supreme Court justices in *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973). So long as the state provides every child with a minimally adequate education (minimum foundation program), differences in school district spending beyond the specified minimum are not legally significant from the standpoint of the federal Constitution.

Finance Standards and the Handicapped

Are the rights of handicapped children threatened by the *Rodriquez* decision? The case challenged the Texas school financing scheme in which the state guarantees a minimum foundation of support to each district, but great disparity exists in per pupil expenditure between school districts. This decision did not frustrate the due process rights of the handicapped reaffirmed in previous federal decisions with respect to laws or practices of exclusion (Roos, 1974). The court did not hold that education was a fundamental interest, however, for purposes of equal protection guaranteed by the Constitution, which would have required a stronger equality standard than the one adopted by the court. The concept of local control was used as an argument to defend fiscal inequality between districts. Local control was accepted by the court as a rational state purpose.

What is a constitutionally adequate program? Minimum foundation programs have not provided sufficient funds to adequately educate exceptional children. It is, on the average, twice as costly to educate an exceptional child as it is to educate a child in regular education. Low tax base school districts, located in states where real equalization among districts does not occur, will find it increasingly difficult to provide adequate special education programs and services for their increasing population of handicapped students who can no longer be excluded from an appropriate public education.

The application of the equal protection concept to the education of exceptional children has forced a reexamination of the term *equal educational opportunity.* In the 1960's equal educational opportunity meant "equal access to differing resources for equal objectives." In order to provide the most appropriate education for the exceptional child, it should mean "equal access to differing resources for differing objectives" (Weintraub & Abeson, 1973). In other words, the goals established for each child are different based on each child's needs and potential.

The achievement of differing objectives for each child requires varying the amount and mix of resources directed to each child. In this regard three of the judicial standards for equalization mentioned previously are critically important: (a) dollars adjusted according to pupil needs, (b) lack of judicially manageable standards, and (c) negative standards. Standards (a) and (b) recognize the different educational needs of children requiring different resources with, consequently, differential costs. Standard (c) is more basic for it suggests that a school district's wealth may prohibit the more costly programs of special education at "quality" levels. Without additional state assistance to balance disparities in wealth between districts, poor school districts will be prohibited from providing adequate special education programs or will operate special education programs which are significantly inferior to those provided in wealthier communities. Funds used for education must be distributed equitably, whereby each child receives an education suited to his needs. In any event, in situations where sufficient funds are not available to fully fund all programs and services, funds will have to be distributed so as to reach at least minimum standards of achievement for every child, including the exceptional child.

Overhauls in state school finance programs have occurred in a number of states as a consequence of state court decisions which have ruled those programs unconstitutional or state legislative initiative in advance of potential court action. The Education Commission of the States has established an Education Finance Center to analyze current state approaches to school finance and the effects of alternatives.

The Legislator's Education Action Project was initiated by the National Conference of State Legislatures. It will study the impact of recent finance reforms on the quality of special education programs and services.

ECONOMIC FACTORS

Growing Interest in Economic Aspects of Education in General and Special Education in Particular

Three reasons have been cited (O'Donoghue, 1971) for the growing interest in the economic aspects of education during the past decade: (a) the increase in the volume of activity which makes education one of the largest industries and one of the chief employers of highly skilled personnel, (b) the recognition that education may have a significant influence on the employment and income opportunities open to people and may affect the distribution of income, and (c) the postwar emphasis on economic growth and development, with education playing an important role as the provider of skilled personnel for the economy.

Data provided by the National Education Association (NEA Research, 1970b) reveal that a significant portion of the economic resources of the United States are allocated to education. In 1969–1970, educational institutions at all levels as major users of economic resources spent $66.8 billion and employed six million persons. Public elementary and secondary schools alone expended $39.5 billion and employed over three million persons. In 1974–1975, $107.2 billion was spent at all levels, including $61.1 billion at the public elementary and secondary levels (NEA Research, 1975).

In 1974 public elementary and secondary schools employed approximately 3 million instructional personnel alone (National Center for Educational Statistics, 1975). It is little wonder that in recent years education has attracted the attention of a number of economists. Data for seven selected states, comparing the amount of state appropriations for basic and special educational programs at the public elementary and secondary school levels over a four year period (1968–1969 to 1971–1972), indicated that special education appropriations increased at a much greater rate than appropriations for basic educational programs—a range of percentage increase of 3.5 to 112.0 for basic educational programs and 31.2 to 167.2 for special educational programs. The special education dollar expenditures, however, still did not equal the percentage of children identified as handicapped by the states, even though special education programs are more costly than general educational programs (Jones & Wilkerson, undated).

Numerous research studies (e.g., Levin et al., 1971) have linked school achievement and postschool success. An abundance of evidence supports the view that education affects income, occupational choice, and economic mobility.

> Let us assume that a child receives special education services at an excess cost [those costs above what is spent in the regular education setting] of $800 a year for 12 years. He then enters the labor force and works until he is 55. What increase in monthly income will equal the cost of special education if both costs and income are discounted at 8%? The answer is that the handicapped child must earn some $108 a month more after receiving special education services to justify the program in these simplistic terms. It is not difficult to conceive of the 12 years of special education raising the earnings of the handicapped by this small amount—about 63 cents an hour. Thus, it appears that extra expenditures on the order of $800 per year can be justified on purely economic benefits terms (however, data are not available to prove this conclusively). (Kakalik, Brewer, Dougharty, Fleischauer, Genensky & Waller, 1974, p. 214)

Education as a form of human capital is based on the notions that skills and knowledge possessed by people are, in fact, resources, and that human resources represent an important part of the capital available to society. The economic aspects of education for handicapped children and youth have generated national and international interest. Questions being asked by groups such as the United Nations Education, Scientific, and Cultural Organization include:

1. To what extent can a handicapped person become independent by means of appropriate assistance, treatment, and education?
2. What is the cost of lifetime care for a handicapped person who has not received schooling and training for independence?
3. What is the social and financial independence of educated and/or trained handicapped people in the labor market?
4. What are the average costs of caring for handicapped individuals who are partially or totally independent?
5. What are the savings to the community, expenses avoided, taxes gained by educating and/or training the handicapped?
6. How much time does it take for the community to regain by taxes or other means the extra funds spent on the education of the blind, deaf, physically, or mentally handicapped student?
7. What is the relationship between the community output for the education of the handicapped and the subsequent benefit from their taxes and so forth?

Education and the Growing Emphasis on Efficiency and Productivity

Commensurate with the steady increase in the percentage of public funds allocated to general and special education has been the growing concern over the efficiency with which allocated resources are used. After a period of comparative neglect, the general question of efficiency in public expenditure is one which recently has received considerable attention from economists. With the predicted leveling off of educational funds, there is great concern over getting the most out of available resources. Educators also are adjusting their thinking in terms of what they are doing and how they are doing it. The goal is to maximize the returns from a given amount of resources devoted to education or its components, or to produce at the lowest possible cost that level of educational output which is chosen as desirable. A parallel concern is the development of methods and subsequent research efforts to compare the relative productivity of resources devoted to the attainment of different types of educational objectives.

One immediate problem which has been encountered is "the inability of school people to identify, categorize, or agree upon demonstrable programs, accomplishments, or, at least, indicators of accomplishments. . . .which . . . fosters the impression that they are confused and uncertain about the real purposes of education" (Crismar, 1974, p. 14).

There are some educators and economists who would assert that education is strongly anti-inflationary because it contributes to productivity through the development of human skills; that is, schooling produces the human resource which itself is a means of production (Jacobson, 1974). Some of the unexplained annual economic growth of Western countries after World War II could not be attributed to land (natural resources), labor (human services), or capital (produced means of production) alone. Some economists contended that education was responsible for the unexplained growth. The skills and knowledge possessed by people are resources. Others argue, however, that despite efforts to account for this unexplained growth, the proportion of unexplained growth remains high (Bowman, 1970).

Nonetheless, educators must look for better ways to use the human and material resources made available to them in order to provide for effective and efficient programs and services.

Providing an education for exceptional children is justified from an economic standpoint. Schools have access to an underdeveloped resource—the exceptional child. Heretofore, they have not taken advantage of a potentially productive market. An earlier discussion of the benefit-cost analysis of educational programs for the mentally retarded lent support to the notion that economic investment in the exceptional child pays dividends. Life-time benefits which are accrued to the economy by educating an exceptional child by and large will outweigh in varying degrees the cost of the education. The provision of improved programs and services for all handicapped youth capable of reducing their dependency on others and increasing their contribution to society is justifiable.

Traditional social attitudes viewing the exceptional child as a deviate have fostered the practice of exclusion or isolation from the mainstream of the formal educational process. Emerging public policy, as exemplified in recent federal legislation, dictates that education provided the handicapped must be appropriate in the least restrictive alternative educational placement (US Congress, 1974). Consequently, exceptional children are being mainstreamed into the fabric of student life. In order to provide appropriate education, a continuum of special education organizational and instructional strategies is offered in the educational setting to fit the educational needs of each child and the public policy objective of student integration, insofar as the handicap will allow. Flexible programing presents an opportunity for practitioners and evaluators of special education to examine various human and material resource configurations of the several delivery systems (e.g., regular classroom with consultation and regular classroom with resource room) in order to find the most productive and efficient ways to accomplish educational objectives established for children classified along various categories of exceptionality and degrees of severity. The evaluative technique of cost-effectiveness analysis holds some promise. Initiatives in this area could serve as a catalyst for the entire educational community.

Education and General Conditions in the Economy

> The economy is ailing and the prognosis for the public schools is not good. How grim the prospects are and how the education community might respond are timely questions. (Ecker-Racz, 1975, p. 19)

The quotation is from a presentation made by economist and author L.L. Ecker-Racz at the 1975 Annual National School Finance Conference. The prognosis is not good due to this country's increasing dependence on other countries for raw material and energy for production and the vulnerability of prices to foreign influence. Thus, a slow rate of economic growth is predicted. Economic growth or productivity is measured in output per man hours or gross national product. Technology and automation have assisted industry and agriculture in achieving rapid economic growth or productivity. The role of industry relative to the provision of human services has declined, and service industries (e.g., education) which are consumption oriented, have not been able to demonstrate their economic productivity.

Impact of the energy crisis. Anderson (1975) examined the impact of the energy crisis on the nation's public schools. He reported that the "nation's bad habits and the energy crisis have had serious consequences for the nation's educational system" (p. 79). He revealed that, of all the space heating and cooling energy consumed in the United States, 11% may be attributed to the American school. The transporting of children to and from school each day consumes 500 million gallons of gasoline annually, while driver training programs use 18 million gallons. Investigations revealed that school officials were unprepared to handle energy problems resulting in shortages and larger increases in costs. The impact is felt not only directly in the purchase of gasoline, but also indirectly in all school purchases that are produced by forms of energy. The effect may be a threat to the quality of educational programs unless there are increased allocations to education so that it will be able to maintain resource levels during inflationary periods.

Inflation. The prospects for education in this inflationary spiral are not encouraging. Since education exhausts more state dollars than any other component of the budget, there will be critical attacks on the amount and nature of educational spending. A report of a survey conducted by the Education Commission of the States (ECS) reported that "inflation already has taken a substantial bite out of numerous education programs, more than anticipated, and that the situation probably will get worse before it gets better" (Jacobson, 1974, p. 9).

While the rate of inflation during the 1973–1974 school year was estimated at 12%, the education agencies of 23 states reported a gain of less than 8% in total expenditures, irrespective of revenue source for public education in 1974–1975. Any increase in expenditure has been eaten up by double digit inflation. Notable cutbacks in 34 states were in (a) the purchase of instructional materials, (b) new construction, maintenance, and repairs, (c) innovative and experimental programs, (d) extracurricular activities and athletics, (e) hiring of personnel, and (f) transportation.

Common steps to curtail costs have included strict limitations on travel, centralized purchasing of supplies, streamlined bus scheduling, car pooling, publications reductions, close evaluation of new hiring, and management workshops for administrators. The cries from advocates using the courts as an avenue of change have made education for the handicapped by and large immune from such cuts in 75% of the states reported (Jacobson, 1974).

It is predicted that, in real terms, allocations to education will level off. This is in contrast to the past 15 years during which education was viewed as a rapidly growing public sector endeavor. Although the increasing size of school enrollments has been a cause of the increase, the actual increase in expenditures has been 237% due to new and expanded programs, capital facilities, compensation to school personnel, and a reduced pupil-teacher ratio (Crisman, 1974).

At present there is a great dependence on the local real property tax to provide much of the revenue to run the schools. The tax cannot be depended on for increased revenues, however, due to public resistance and its relative inflexibility to price changes in the economy. It is also viewed as regressive and inequitable by its harshest critics.

Other conditions. There are other economic conditions which are creating problems for education. Through the development of strong unions, teachers have demanded sizeable increases in salaries. It is noted that in almost all of the reporting states in the ECS study, salary and salary increases were consuming sizeable portions of annual budgets. As mentioned earlier, salaries for personnel traditionally have consumed 80 to 85% of the budgets in this labor intensive industry. Of course, commensurate with the rate of inflation has been a steady rise in the price per unit of other purchased resources.

There appears to be some public disenchantment with schools for it does not seem that increased spending has produced a quality education for their children (Ecker-Racz, 1975). To some, the steady decline in school enrollments might signal the need for reduced expenditures at a comparable rate. To date this decline has been less than 2%. Due to inflation and the phenomenon of economies of scale explained earlier, a comparable reduction is certainly not advised.

In addition, the citizenry is disturbed over the occurrence of teacher strikes and the increasing proportion of professional staff members who do not work directly with children. For example, there is an imperative to hire directors and supervisors of special education to coordinate the development of new programs and programs of increasing size to serve new or inappropriately served exceptional children.

Federal Assistance to the States

In light of the scarcity of economic resources, a national posture of fiscal austerity prevails. This has emerged at a time when federal and state courts have demanded the provision of programs and services for exceptional children and the equalizing of educational opportunity for all children residing in a state. The wide disparities which exist in the amount of dollars expended for each child are to be reduced or eliminated.

While the total amount of federal assistance for education has steadily increased since 1970, the percentage of federal financial aid to education, compared to state and local contributions, has been decreasing. The downward trend in education's portion of federal aid actually began in 1968. In that year federal aid dropped from a high of 16% to 15%. It has been declining ever since. In 1973 federal aid to education represented 10.1% of the total education dollar. The recent decrease has come at a time when the federal government greatly increased aid to states and local communities from 1972 to 1973 to reflect its policy shift from categorical grants to federal revenue sharing (US Department of Health, Education, and Welfare, 1974).

It must be noted, however, that the federal "aid to the states" category for the education of handicapped children (ESEA, Title VI-B) doubled between fiscal 1974 and 1975, from $47.5 million to $99.6 million. In terms of the actual fiscal needs of states and local districts to meet the new mandates, however, this represents but a minute fraction of the total with which to implement and expand new state and local programs.

Despite the continuing growth of federal funds for education of the handicapped, there will probably not be appropriated in the next several years all the funds that are necessary to bail out the states as they attempt to meet mandates for educating all handicapped children. The fiscal requirements of the states, nonetheless, are not going to disappear. As a consequence of the present condition of the economy and the probability that additional funds may not be appropriated to the total educational budget for some time, numerous battles may be waged within the federal, state, and local educational communities for available funds.

Under these conditions, any increase in legislative appropriations or administrative allocations to fund mandated programs for the handicapped may cause a reduction in appropriations or allocations to other educational programs. One battle already has been waged in Congress when an unsuccessful attempt was made by several House members at the close of the 93rd Congress to reduce funds from federal "impact aid to the states" in order to increase the appropriations to the disadvantaged and handicapped (Ballard, 1974).

State Assistance to Local Educational Agencies

The social objective of *equality of educational opportunity* and legal factors of *due process* and *equal protection of the laws* have forced states to reexamine the economic aid provided to local educational agencies. Those areas subject to scrutiny have been local fiscal ability and effort, and educational needs and cost.

Local fiscal ability and effort. Earlier in this chapter, the concepts of fiscal ability and effort were introduced as strong determinants of a student's access to financial resources and equality of educational opportunity. Currently there is wide variation in ability and effort expended by local education agencies within the United States. Until recently few controls were placed on the level of financial resources accessible to students to provide real equity. Fiscal ability or capacity may be defined as the measure of fiscal bases which a taxing jurisdiction is taxing or could tax to raise revenue for public purposes. Tax effort relates to the degree to which the jurisdiction is willing to use that capacity to raise revenue. Tax sources include the property, sales, personal income, corporate income, excise, and estate and inheritance taxes.

The local property tax has been the major source of funds for local government operation including education. Property, income, and retail are unevenly distributed within a state. This creates inequities in the capability of districts to finance education. It forces low tax base districts (as measured by assessed valuation of property per pupil) to set a higher tax rate than high tax base districts in order to compensate for the tax base inequity (tax levied is equal to the tax base times the tax rate). In most cases, however, a district's per pupil expenditure may only approach the state average. This inequity also exists between states and, in the case of one study, a relationship was found between the extent of services provided for exceptional children and the fiscal capacity of states (Thomas, 1973b).

Since education is unquestionably a function reserved to the states, school districts—their boundaries and size—exist at the discretion of the state legislature. The state has the ability and responsibility to significantly reduce or eliminate inequities. The consolidation or elimination of districts of inefficient size is one method. In fact, the number of school districts decreased from 95,000 to 18,000 nationwide between 1948 and 1970 (Hooker & Mueller, 1970; NEA Research, 1970a). Generally speaking, reorganization of districts has not been sufficient. Subsequent to court and legislative action, new formulas have been devised which allow the state to distribute funds on a proportional rather than equal basis to compensate for the inequity.

There are other legitimate reasons for distributing funds in a proportional manner to local districts. Population density factors, as related to economies of scale, have been recognized as one legitimate factor in the proportional distribution of state funds. A weighting factor per pupil is used to compensate for the higher educational costs per pupil experienced in rural areas.

It is incorrect to assume that the educational needs of students enrolled in regular education, early childhood education, programs for the disadvantaged, exceptional child education, adult education, and vocational education can be met by the allocation of equal dollars per child or that the distribution of students needing these programs is uniform between the jurisdictions of local educational agencies. The distribution and characteristics of the population are not uniform due to population mobility and socioeconomic conditions. Until recently, state distribution formulas have not recognized these differences and the burden has been on local agencies to pay excess costs. If the district was not willing or able to bear the burden, then it suffered the consequences of inappropriately serving its clients.

POLITICAL FACTORS

Berke (1973) and his associates at the Syracuse University Research Corporation examined the politics of school finance reforms in Maine, Florida, Kansas, Utah, Minnesota, and California. They found that certain factors could be associated with the passage of finance legislation: (a) history of reform effort, (b) factors external to ordinary state educational decision making, (c) political leadership, (d) a package of legislation consisting of a set of tradeoffs, and (e) fiscal surplus and general revenue sharing funds.

In each case, there was a history of effort to reform educational finance, such as a gubernatorial study committee in Florida or a legislative study committee in Kansas. A later legislative study committee in Florida consisted of powerful legislators and a support staff of professionals with expertise. Over several years public and legislative opinion was developed. In some cases, previous laws served as forerunners by altering the existent statutes, thereby setting the stage for major reform. In Utah the reform legislation was a consolidation of those forerunner provisions.

Factors external to educational policymaking have facilitated change. In the 1971 *Serrano v. Priest* case, the California Supreme Court decreed a constitutional principle: that the quality of public education may not be "a function of the wealth of . . . [a pupil's] parents and neighbors." The fact that there were major reforms in the public school aid programs of eleven states during the 1972–1973 legislative year suggests that litigation had a substantial impact on the enactment of each (Grubb, 1974). There have also been a number of individual state cases which preceded or paralleled legislation.

The National Educational Finance Project, the President's Commission on School Finance, the National Lawyer's Committee for Civil Rights under Law, the National Conference of State Legislatures (NCSL), and the Education Commission of the States have all contributed knowledge of the status of school finance and suggested ideas for improvements. There also have been special studies in a number of states. The Legislators Education Action Project of NCSL was commissioned by the Maryland legislature to examine the state's special education aid payments to its county school districts and the quality of programs and services being provided to exceptional children in those jurisdictions.

An important factor has been the political leadership from within the state legislatures. Informed staff members of legislative education committees and legislators who became knowledgeable of the various issues in educational finance, and may have staked their reputations on the issues, were chiefly responsible for the changes. In some reform states, legislative leaders had previously served as chairpersons of education committees. In some cases, governors had exerted a leadership function. Generally, state education agencies did not provide leadership, but they provided support in some cases to legislators and executive leaders.

Finance legislation was "a package of measures or the set of compromises which [was] developed to bring together a winning coalition" (Berke, 1973). Berke concluded that finance reform bills alone would seldom involve enough interests to pass them. In Kansas, for example, after the revenues to each district were estimated from the proposed general formula, seven other bills were added to the reform bill to compensate those legislators whose districts stood to lose by the formula. The governor added support after the legislators agreed to his corporate disallowance tax measure. In Utah and Florida the tradeoffs were within the bill itself, involving urban and nonurban interests.

Little tax legislation was required to fund the reforms, because every state picked up added first year costs from its available fiscal surplus or general revenue sharing money.

In light of the findings, Berke suggested a strategy for change. The strategy is basically to develop a winning coalition behind a meaningful proposal. The coalition can be all inclusive, in which every major interest in the state is involved, or a minimum winning coalition can be established, i.e., a coalition which provides the lowest majority needed for passage. Associated with the coalition is its link to a special legislative study committee, commission, or research activity involving legislative leaders. Eight tactics were proposed which operate within the broad strategy:

1. Communication of basic notions of school finance to laymen.
2. Working relationship between educational leaders and interest groups and legislators and their staffs.
3. Coalitions between various educational interests and noneducational interest groups to widen the base of interest and support.
4. A package of measures needed to pass legislation after considering the impact of the major piece of legislation on various interests.
5. A compromise on nonessentials or minor provisions.
6. Provision for strategic increments on critical matters to be built into the legislation to facilitate the improvement of legislation in future stages.
7. Willingness to operate in the absence of perfect data and build in a data base system.
8. Specifying what is meant by local control and status of prerogatives available under the new legislation.

An analogy may be made between the findings of Berke with respect to major educational finance reforms in several states and a major reform movement in federal financial assistance for the education of handicapped children. The federal reform was conceived in 1972 when it was first introduced to the Congress. The financial needs for the education of exceptional children had been documented, for example, by the 1970 National Educational Finance Project's special study on the high costs of programs for exceptional children. The bill failed to become law at that time, but it served to create an awareness on the part of lawmakers and staff members of the Senate's Labor and Public Welfare Committee and the House's Education and Labor Committee. In 1973 the Rand Corporation completed a report for the US Department of Health, Education, and Welfare on educational and other services for handicapped youth which was widely circulated.

The Council for Exceptional Children (CEC), which had been participating in the bill from its inception, teamed up with other organizations such as the National Association for Retarded Citizens. Close links were established between representatives of these national organizations and Congress. An amendment to Part B of the Education of the Handicapped Act, increasing aid to the states, was passed as an intermediate measure as part of the omnibus Education Amendments of 1974 (P.L. 93-380). These national organizations remained at the service of key members of both educational authorizing and appropriating panels in Congress to provide updated information on status and needs. CEC had instituted a nationwide Political Action Network, in part to assist in promoting the legislation. Other organizations similarly used their memberships. Recent favorable federal and state court rulings on the issue of the handicapped child's right to a free publicly supported education added fuel to the requests for federal financial support.

As the movement gained momentum, the base of support was broadened to include the general education community. Organizations such as the Council for Chief State School Officers, the National Education Association, the National Association of School Boards, and the Committee for the Full Funding of Education (an organization of many varied educational interests seeking greater appropriations for education) have lent their support. Since these general education organizations also have a vested interest in certain aspects of the pending legislation dealing with funding formula, levels of funding, oversight activities, compliance mechanisms, and the flow of funds through state and local educational agencies to the child (known as a *pass through*), compromises were evidenced as the legislation moved through subcommittees, full committees, full chambers, and the conference committee on the issue.

Many representatives and senators staked their reputation on the issue. The bill, commonly known as S. 6, became P.L. 94-142 in November 1975. It provides a potential of over $1 billion of federal aid for education of the handicapped by 1981. For further details, see the discussion of P.L. 94-142 in this section.

II. THE COSTS OF SPECIAL EDUCATION

The costs of special education cover a broad area in the literature. In order to discuss costs one must first grasp the concept of *cost*. Special education costs may be structured in several ways, according to the purpose for which one determines costs. In addition, a taxonomy of special education costs permits a better visualization and understanding of levels of cost specificity. Several different approaches have been taken to determine costs.

CONCEPT OF COST

Recent interpretations of educational costs (e.g., Thomas, 1971; Haller, 1974) depart from the traditional view of costs as only "program expenditures." These recent interpretations stem from the basic economic question of how to allocate resources in scarce supply. By consuming resources in one manner, those same resources are not available for consumption in alternative ways. In short, costs may be viewed as benefits given up rather than benefits received, by choosing to use them in one manner rather than another. Benefits foregone (lost) are called opportunity costs. Some cost considerations may not entirely be monetarily estimatable.

THE STRUCTURE OF SPECIAL EDUCATION COSTS

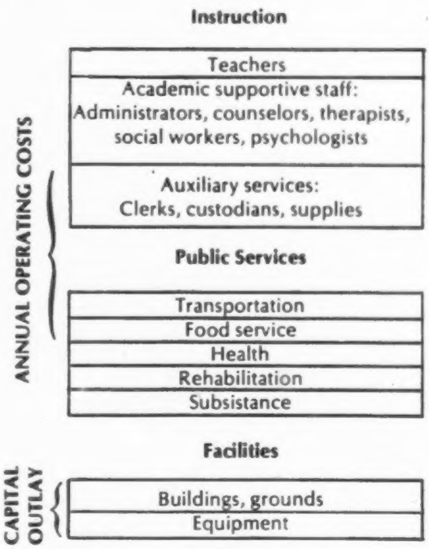
The structure of a cost model for special education should depend on the analytical purposes for which the model will be used. Its structure should reflect the complexity of what the model represents, the precision with which resource consumption is or can be known, and the decision maker's requirements for informational accuracy on questions of cost.

A Structure Sensitive to Cost Variations between Severity and Type of Exceptionality

McClure (1975) provided a cost structure for special education, the elements of which are sensitive to and reflect sources of variation in costs between the severity and type of exceptional condition (see Figure 1).

Expenditures on the severely handicapped are higher than outlays to serve students with milder handicaps. Cost categories sensitive to special education resource use will reflect the differential costs by category associated with the severity of handicapping conditions. The cost for instructional supervision will be reflected in staff-student ratios and differential costs. The degree of support staff intervention will also be demonstrated. Other unusually high costs are associated with public service categories to provide transportation, food, health, and facilities, particularly since some exceptional children require the use of special or residential facilities.

Figure 1
Components of Special Education Costs



Note. From "Alternative Methods of Financing Special Education" by W.P. McClure, *Journal of Educational Finance*, 1975, *1*, 42.

Total cost variations and variations by cost category may also be observed by program category (e.g., educable mentally retarded, visually handicapped, special learning disorders). It has been observed, for example, that programs for the gifted and for the speech handicapped are much less expensive than programs for the physically and auditorily handicapped child. The reasons for such variation can be obtained through cost analysis.

A Structure Sensitive to Cost Variations Between Special and Regular Education

When an assessment of program cost configurations between regular, special, and other educational programs is necessary, then a cost structure with elements common to all programs is required for comparability. Such is the case with the cost element structure provided in Figure 2. Such a structure, however, obviously is not as descriptive of the resource configuration of special services offered by special education. By using the format in Figure 2, comparisons can be made between the needs of children, types of programs designed to meet those needs, and the required level of program funding.

Figure 2

Components of Special and Regular Education Costs

	Regular program cost (1)	Regular program cost per pupil[a] (2)	Special program cost by category of exceptionality (3)	Special program cost per pupil by category of exceptionality[b] (4)	Cost differential per pupil or excess cost[c] (5)	Cost index of special to regular program[d] (6)
Management						
Administration						
Clerical and secretarial						
Instruction						
Teachers						
Teacher aides						
Instructional Support						
Supplies and equipment						
Guidance and counseling						
Other						
Institutional Operations						
Operating and maintenance						
Fringe benefits						
Other						
Services						
Health						
Food						
Transportation						
Cost per pupil in ADM						
TOTAL						
Current operation						
Transportation						
Cost per pupil transported						
Capital outlay/ ADM						
Debt service/ ADM						
Teacher-pupil ratio						
Square feet of classroom space per pupil						

Note. From *Educational Programs for Exceptional Children: Resource Configurations and Costs* (National Educational Finance Project Study No. 2), by R. A. Rossmiller, J. A. Hale, and L. Frohreich, Madison: Department of Educational Administration, University of Wisconsin, 1970, p. 256.

[a] Costs of regular education divided by FTE (full time equivalency) of pupils in regular education. (FTE = 1.0 = Students assigned to program full time.)

[b] Costs of special education divided by FTE of pupils in special education.

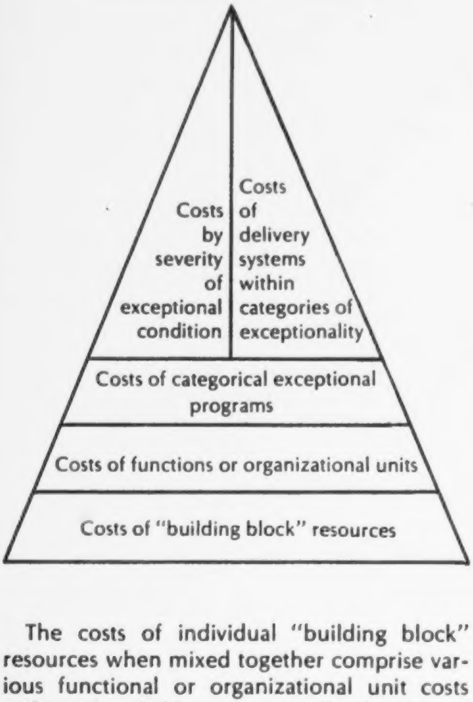
[c] Column 4 minus column 2.

[d] Column 4 divided by column 2.

A TAXONOMY OF SPECIAL EDUCATION COSTS

Perhaps the best way to visualize and understand the costs of special education is to conceptualize a taxonomy of special education costs in the form of a pyramid as in Figure 3.

Figure 3
A Taxonomy of Special Education Costs


Costs by severity of exceptional condition
Costs of delivery systems within categories of exceptionality
Costs of categorical exceptional programs
Costs of functions or organizational units
Costs of "building block" resources

The costs of individual "building block" resources when mixed together comprise various functional or organizational unit costs within identifiable programs. Total program costs for each category of exceptionality are made up of functions or organizational units. Total program costs can be viewed from the perspective of a "severity of condition" classification within categories of exceptionality or by the various delivery systems that may be employed to deliver categorical programs.

Costs of "Building Block" Resources

The most finite cost categories are by the specific human and material resources consumed in program and service delivery. Haller (1974) categorized these as the "building blocks" of costs. They are time, space, equipment, and supplies.

Time refers to that period during which human resources are being expended on particular special education activities. Human resources include the time of staff, students, and volunteers. Time may be converted to dollars in the case of personnel salaries. However, salaries are not inclusive of all variations in committed personnel time required by the nature of various delivery systems. All time, whether monetary or nonmonetary, is a legitimate cost. In addition, personnel time committed to one activity is always at the expense of time committed to another activity (foregone opportunity costs). Students' time may be translated into costs for students who could be expected to be employed if they were not in school. Otherwise, time consumed during and beyond regular school hours may be measured in student instructional hours obligated by a program. As with staff time, while a student is engaged in one activity, he cannot participate or is limited in his participation in other activities. That is a legitimate cost and is referred to as foregone learning.

Space refers to the amount of use of resource rooms, offices, clinics, and other facilities consumed by a program. It may be measured in per student hour cost. Components of facility cost include interest on debentures (unpaid debt), imputed (foregone) interest on equity, depreciation (annual decrease in value), maintenance, and overhead (light, power, and heat) (Thomas, 1971).

Equipment costs should be prorated to programs over the item's expected life span. Components include imputed interest, maintenance, and depreciation (Thomas, 1971).

The cost of *supplies* can be found by adding together the annual cost of each different unit of purchase. The annual cost per unit is estimated by multiplying the number of units by the price per unit and dividing the product by the item's estimated life span in years. The average cost per pupil served by the special education program may be determined by dividing the total cost for supplies by the number of pupils.

Costs of Functional or Organizational Units

Traditionally, resource expenditure categories in school district budgets are by line-item function or organizational unit such as instruction, pupil personnel services, transportation, and food services. A cost structure may be made more detailed by listing objects within each functional or organizational category. Objects include purchased services, supplies and capital outlay, and other expenses. An object may or may not be specific enough to be considered a resource.

These functional or organizational units may not be listed under identifiable programs, but rather may include costs across all programs. In order to analyze program costs, a procedure known as a *crosswalk* is performed to separate out functional or organizational costs by exceptional program category.

Rossmiller and his associates (1970) compared special education expenditures by functional categories, as shown in Figure 2. Salaries for teachers and teacher aides, which compose the function of instruction, were the largest single expenditure. Transportation costs for the physically handicapped were very high. Orthopedically impaired children require specially equipped buses. Where transportation costs were minimal, the transportation of handicapped pupils was a parental responsibility. Instructional support was an expensive component since guidance, counseling, and rehabilitation personnel, psychologists, therapists, doctors, and nurses were widely used.

Expenditures for operation and maintenance were directly related to class size. Since special education classes used regular classrooms, and teacher-pupil ratios were lower than for regular education, a larger square footage per child existed which increased operations and maintenance costs per exceptional child.

In a related study, Bentley (1970) found that expenditures on administration, fringe benefits, instructional supplies and equipment, operation and maintenance, supportive services, teachers, teacher aides, and transportation all contributed significantly to cost differentials in functional categories between special and regular education. Only expenditures for clerical and secretarial and food services did not seem to make a difference. There were great variances between school districts in the degree to which categories contributed to the differential, however.

Clemmons (1974), in a study of six Minnesota school districts, obtained similar results to Rossmiller and Bentley. He also found that noncertified staff salary benefits and salaries of other noncertified personnel did not contribute to the cost differential.

Costs of Categorical Exceptional Programs

A preponderance of research into the costs of special education has focused on examining expenditures by categorical program. In 1970, Rossmiller, Hale, and Frohreich conducted a National Educational Finance Project (NEFP) special study. The study sought to determine cost differentials associated with educational programs for the various categories of exceptional children relative to the costs of the regular school program provided for normal children. The determination of relative costs and cost indices was based on the current practice of states and their local districts regarded by authorities in special education as leading in the provision of educational programs for exceptional children.

With every exceptionality, the median per pupil costs exceeded those for regular education. Thus the education of exceptional children involves excess costs in varying degrees. At the time of the study, the median per pupil expenditure across all districts was $655. The total per pupil costs and excess costs for various exceptionalities are shown in Table 3.

Table 3
Per Pupil and Excess Costs by Exceptionality

Category of exceptionality	*Annual per pupil expenditure*	*Excess cost (cost differential)*
Gifted	$ 809	$ 154
Educable mentally retarded	1,316	661
Trainable mentally retarded	1,627	972
Auditorily handicapped	2,103	1,448
Visually handicapped	2,197	1,542
Physically handicapped	2,113	1,458
Speech handicapped	799	144
Special learning disorders and neurological handicaps	1,757	1,102
Emotionally disturbed	1,683	1,028
Multiply handicapped	1,941	1,286

A cost index is the ratio of average per pupil expenditure for children in a category of exceptionality to the average per pupil expenditure for children in a basic regular elementary program. Cost data were gathered within each district by specific educational programs for a given category of exceptionality and by programs for normal children. In order to provide comparable data, a uniform program cost and element format was developed which required the reconstruction of district cost data. It was suggested that the median cost index be used as the soundest basis for fiscal planning and forecasting, for it tends to reflect what might be termed average practice in that set of districts. The median cost index ranged from 1.14 for programs for the intellectually gifted to 3.64 for programs for the physically handicapped. At the time of the NEFP study, most districts were operating self contained programs.

Other studies have been conducted, most of which have used the NEFP methodology, and tend to support its relative cost findings (see Table 4).

The Costs of Delivery Systems

The placement of exceptional children into the least restrictive environment requires the availability of a continuum of services. The educational placements of these children is a function of the type and severity of handicapping condition as conceptualized in the framework by Reynolds shown in Figure 4.

With the trend now toward the mainstreaming of handicapped children, it would be advantageous to determine the differential cost of various delivery systems used within an identified category of exceptionality as shown in Figure 4. The resultant cost determinations would

Table 4

A Comparison of Cost Indices

	Study and States Involved					
Category of Exceptionality	*Rossmiller et al.*[a] *(Wis., Fla., Calif., Texas, and N.Y.)*	*Jones and Wilkerson*[b] *(Indiana)*	*Sorenson*[c] *(Illinois)*	*Snell*[d] *(Indiana)*	*Clemmons*[e] *(Minnesota)*	*Texas Education Agency*[f] *(Texas)*
Gifted	1.14					
Educable mentally retarded	1.87	1.63	1.72	1.94	1.71	2.83
Trainable mentally retarded	2.10	1.79	2.31	1.81	2.03	2.22
Auditorily handicapped	2.99	3.71	2.35 (hard of hearing) 2.41 (deaf)	1.55	2.99	3.48
Visually handicapped	2.97	6.01	2.75		2.34	4.38
Speech handicapped	1.18	1.19		1.22	1.27	5.97
Physically handicapped	3.64	2.76	2.94	4.18	2.89	2.39
Special learning disorders	2.16	2.38	2.02	1.32	1.75	2.76
Emotionally disturbed	2.83	3.73	3.95			2.61
Multiply handicapped	2.73	2.93	3.38			
Homebound/Hospitalized	1.42	1.74		1.56	1.22	
Pregnant students						1.29
Minimally brain injured						2.94

[a] Rossmiller, R. A., Hale, A., & Frohreich, L. E. *Educational Programs for Exceptional Children: Resource Configurations and Costs* (National Educational Finance Project Study No. 2). Madison: University of Wisconsin, 1970.

[b] Jones, P. R., & Wilkerson, W. R. *Special Education Program Cost Analysis.* Bloomington: Department of School Administration, Indiana University, 1972.

[c] Sorenson, F. W. *A Cost Analysis of Selected Public School Special Education Systems in Illinois.* Springfield, IL.: Office of the Superintendent of Public Instruction, 1973.

[d] Snell, D. E. *Special Education Program Cost Analysis for Three Selected School Corporations in Indiana.* Unpublished doctoral dissertation, Indiana University, 1973.

[e] Clemmons, A. L. *An Assessment of Cost Variations in Selected Exemplary Special Education Programs in Six Selected Minnesota School Districts.* Unpublished doctoral dissertation, University of New Mexico, 1974.

[f] School Finance-Special Projects Section, Office of the Commissioner of Education, Texas Education Agency. *Educational Program Cost Differentials in Texas* (Prepared for the Governors Office of Educational Research and Planning). Austin: Texas Education Agency, 1975.

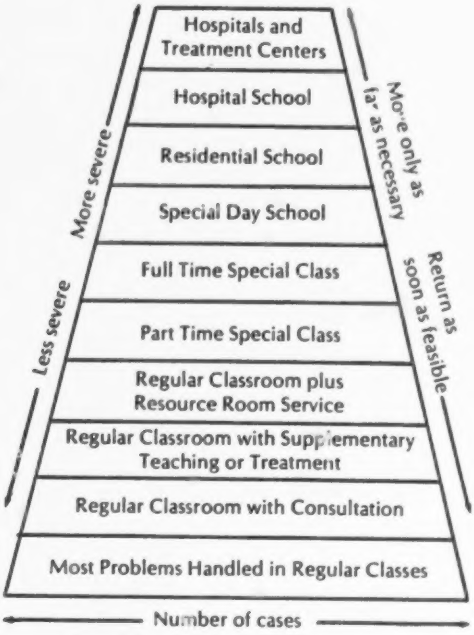

Hospitals and Treatment Centers
Hospital School
Residential School
Special Day School
Full Time Special Class
Part Time Special Class
Regular Classroom plus Resource Room Service
Regular Classroom with Supplementary Teaching or Treatment
Regular Classroom with Consultation
Most Problems Handled in Regular Classes
More severe
Less severe
Move only as far as necessary
Return as soon as feasible
Number of cases

Figure 4
A Framework for Considering Some Issues in Special Education

Note. From "A Framework for Considering Some Issues in Special Education" by M.C. Reynolds, *Exceptional Children*, 1962, *28*, 367–370. Copyright 1962 by The Council for Exceptional Children.

have implications for more effective financial planning and distribution of funds.

Clemmons (1974) calculated median per pupil costs and cost indices according to different delivery systems within categories of exceptionality in six Minnesota school districts. Median delivery system indices across all exceptionalities were: (a) regular classroom with special consultant, 1.86; (b) regular classroom with itinerant teacher, 1.50; (c) regular classroom with resource room, 2.00; (d) part time special education classroom, 1.66; (e) self contained classroom, 1.67; and (f) homebound or hospitalized instruction, 1.34.

Costs by Severity of Exceptional Condition

McClure, Burnham, and Henderson (1975) analyzed operating instructional expenditures in 23 cooperating school districts. They found that wide variations in cost differentials existed within districts for the same categorical program for exceptional children. They concluded that "the wide variations in cost differentials reflect the variations in severity of handicap among pupils of every category except the most extreme cases" (p. 15). Expenditures on the severely handicapped are higher than outlays to serve students with milder handicaps, because they require greater supervision. This is reflected in the lower staff-student ratio and higher costs. They also require greater intervention of support staff. Other unusually high costs are associated with public service categories to provide transportation, food, health, and facilities, since the severely handicapped require the use of special or residential facilities to a greater extent than children with mild exceptionalities who will be appropriately using services available to nonhandicapped pupils almost entirely.

METHODOLOGY FOR DETERMINING COSTS

Studies of the costs of special education, for the purpose of forecasting financing need, have relied on a determination of excess cost estimates and cost indices based on the best known practice of exemplary programs. A recent approach suggests that financial need should be projected on the basis of educational need. One organization has proposed the use of a cost accounting model to compare special and regular education costs and planned and actual expenses.

Excess Costs and Cost Indices Based on Current Best Practice

Since 1970, when the National Educational Finance Project special study on the costs of programs for exceptional children was published (Rossmiller et al., 1970), several studies have, for the most part, replicated its procedures (Jones & Wilkerson, 1972; Snell, 1973; Texas Education Agency, 1975; Sorenson, 1973; Clemmons, 1974).

In these studies exemplary districts were chosen, by reputation nationwide or statewide or from demographic strata within a state, as representing the current best practice. In most cases the costs of special education are contained in traditional line-item expenditure categories of school district budgets. Consequently, the costs of special education must be isolated and transferred to a uniform program cost and element format. Some costs, unlike most instructional costs, cannot be directly charged to special education—costs such as transportation, capital outlay, and debt service. These costs are usually apportioned to special education on a per pupil basis.

In these studies special education costs have been compared to regular education costs per full time equivalent student. Cost indices were then calculated dividing the per pupil costs for a category of exceptionality by the per pupil costs for a basic regular elementary education program. The excess cost of exceptional child programs is the cost differential between special and regular education programs.

Studies of this nature have laid the groundwork for more definitive studies. The limitations that are inherent in them should be recognized (Rossmiller & Moran, 1973). The costs of special education programs represented the "current" best practice at one point in time and not necessarily desirable practice or the practice of districts selected on some predetermined criteria of quality. Actual costs are a function of level of funding rather than need. Most programs were not distinguished by the delivery system or systems employed within categories of exceptionality which appear to cause great variation in costs.

Most studies encountered noncomparable and unavailable data. Precision is lost when cost data must be (a) reconstructed to fit into a uniform program cost and element structure, (b) allocated or prorated to any number of programs, (c) guessed at, or (d) estimated by more than one person or one team of people working together. Descriptions of programs and criteria for eligibility vary among school governmental units. In mainstreamed programs there is the problem of parceling out the time and resources devoted to special educational services. While statewide generated cost indices may be important predictors of costs for statewide planning purposes, they represent averages and do not reflect local conditions which should be considered when allocating funds to local districts within a state. A cost index may mask inefficient programs. Costs will differ between districts for identical programs due to differences in pupil-teacher ratios, the number of students needed to operate at maximum efficiency, and the cost per unit of purchased professional personnel and other resources.

A question arises as to the exactness of the required cost determinations. If all handicapped children are to be educated in their least restrictive environment, then in order to determine costs accurately in the professional accounting sense, it would require observing and recording the resource consumption of each individual exceptional child. Adding to the problem of accounting is the trend away from the conventional classroom toward individualized student programs containing any number of student grouping patterns and differentiated staffs, that is, a flexible delivery system. This implies resource consumption that is different for each student. Under such conditions, obtaining approximate local costs may be sufficient for state planning and fiscal distribution purposes.

Several points should be kept in mind when investigating differential costs. It may be wise to select school districts or programs on the basis of a predetermined standard of operation to avoid the inclusion of inefficient regular and exceptional programs. Programs that are starting up should be distinguished from those that are ongoing, since the costs of implementation can greatly increase annual costs. In order to ensure that cost data are collected uniformly and comparably, a single individual or team of individuals should make value judgments when transforming the district's traditional line-item budget or program budget format to the common program budget. The manner in which indirect costs are charged against regular and special programs can have a significant effect on the amount of excess cost and, subsequently, the size of the cost indices. The costs of preschool programs for handicapped children should be estimated, since many states have directed local districts to operate such programs.

An Excess Cost Approach Based on Need

The Council for Exceptional Children convened the Airlie House Conference in 1973 in response to the growing interest in the use of the excess cost approach to reimbursing school districts and the growing awareness that no really precise concept exists of what constitutes excess cost. A step by step method was developed (Taylor, 1973) for determining excess school level costs by delivery systems within categories of exceptionality:

1. A program delivery system model is identified as a basis for special education programing.
2. A set of incidence figures is adopted.
3. Using school census data and incidence figures, the number of exceptional children is determined by category of exceptionality.

4. The percentage of children with each type of exceptionality who should be served by each delivery system is estimated.
5. By applying the percentages obtained in step 4, the actual number of children to be served by each delivery system is determined.
6. Appropriate pupil-teacher ratios for each delivery system within each category are established.
7. Criteria for determining costs are established for each delivery system and each category of exceptionality.
   a. For programs which offer special education services as supplements to regular education, such as regular classroom with special consultation to the teacher, regular classroom with itinerant teacher, and regular classroom with resource room, the additional (incremental) costs of supplementary services—primarily the costs of personnel, travel, educational supplies, and materials—are established.
   b. For programs which offer special education services as substitutes for regular education in the regular school building, such as part time or full time special education, the total cost of serving handicapped children which may be expected to differ from the costs of educating regular children is established.
   c. For programs which offer special education services as substitutes for regular education outside the regular school building, such as special day school, homebound instruction, residential school, or hospital, the total costs of serving handicapped children are established.

   It must be remembered that costs established in (a) and (b) are partial costs. They do not include any prorations or allocations of joint costs, that is, those shared jointly between special and regular education such as operation and maintenance of buildings, principal's salary, and so forth.

   In order to estimate systemwide costs of the total special education program, there must be added both administrative and program cost items such as the salary of the district director and supervisors of special education, curriculum research, systemwide instructional services, and so forth.
8. Regular education costs are compared to the costs of special education programs by the following process:
   a. Obtain a school district's present operating budget.
   b. Determine present 7a, 7b, and 7c costs included in (a) and also systemwide special education costs included in (a).
   c. Subtract (b) from (a) to give "base regular costs."
   d. Calculate the replacement costs for (b) programs as follows:
      (1) Divide the base regular costs by the number of children enrolled in regular education plus the number of exceptional children enrolled in regular classrooms (equals per pupil cost of regular education).
      (2) Multiply (1) above by the number of children enrolled in part time or full time special classes. This gives the "replacement cost" for these children, that is, the cost of educating them if they were not special.
   e. Add the replacement costs for pupils in part or full time programs to the base regular costs (c) to give the adjusted base regular costs, that is, the costs of providing service to all children if they did not require any special education services.
   f. Adjust the adjusted base regular costs due to differences between the school district's actual enrollment pattern and the estimates of what the enrollment pattern should be from earlier steps.
   g. Add to (f):
      (1) The full costs of educating children outside of the regular school setting.
      (2) The supplementary costs of children receiving special assistance in the regular classroom.
      (3) The difference between part time or full time special education costs and replacement costs multiplied by those who should be in part time or full time special education programs.
      (4) Estimates of systemwide special education costs required by the pattern of special education services.

A Special Education Cost Accounting Model

Ernst and Ernst (1974) proposed a cost accounting technique which purported to be applicable to both regular and special education across all jurisdictions. The technique would allow for the analysis of variations in expenditures as a result of the differences in the units of education planned to have been delivered as compared to the units actually delivered, and/or as a result of the difference in the price estimated to be paid for a unit as compared to the actual price paid.

The Ernst and Ernst Student Educational Unit (EESEU) is the unit of service measure. It defines each unique educational activity, such as classroom instruction in mathematics, in terms of units of service. Each 10 minute period is a unit of service.

EESEU's are grouped into three activity categories: instructional, holding (supervision of the child exclusive of instruction), and service (delivery of a service to the child). The total rate for each EESEU is composed of four components of 10 minutes of costs identified as primary, secondary, tertiary, and quarternary, developed for the purpose of associating specific kinds of costs necessary to deliver each EESEU. It is recognized that different kinds of costs are assigned or allocated on varying bases.

The primary rate for each EESEU includes only the cost of the person most directly responsible for a given activity. The secondary rate includes the cost of personnel other than the primary person, books, equipment, and consumable supplies required in order to deliver a unit of service. These costs may be directly associated with an EESEU (i.e., assigned) or indirectly associated (allocated or prorated). Districtwide and school administrative costs related to the delivery of a unit of service comprise tertiary rates. Included in this group are the allocation or proration of salaries of administrative or contractual service personnel, travel, supplies, and fringe benefits. The quarternary rate component represents certain items of occupancy cost allocated and related to each EESEU. Included in this component are districtwide and school operations and maintenance expenses, contractual services, supplies, heating and utilities, depreciation, and so forth. An individual card is used to record the costs of each EESEU.

A number of subsidiary records are needed in order to develop the information required for tracing the variance from planned costs. Variances can be traced to changes in student enrollment, resource mix consumption, and price changes occurring during actual curricular operation.

The Ernst and Ernst model was not designed to take cognizance of costs as they reflect future needs. As such the system is more a management control tool than a planning aid. The cost of cost accounting both in time and money would be high, which raises a question as to the model's cost-effectiveness. The model does not recognize that if exceptional students are to be educated in their least restrictive alternative, then they will be receiving instruction in the regular classroom setting. Costs are not accounted for in this model by recording the activities of exceptional children in order to parcel out resources that these students consume. Rather, the costs are accounted for in 10 minute blocks of time without regard to the students receiving educational services. Thus, the model does not distinguish special from regular education costs.

As mentioned previously, the problem of accounting is increased by the trend away from the conventional classroom to individualizing student programs, varying student patterns daily, team teaching, and differentiated staffing. In these situations, an accounting of pupil attendance and capacity, class time, teacher time, and use of resources would be not only expensive but next to impossible. If not conducted properly it would defeat the purposes of accounting, and it may not be any more accurate than present methods for approximating differential program costs. In this model some costs are assigned, while others are allocated or prorated to an EESEU which requires an educated guess anyway.

III. GOVERNMENTAL FUNDING PATTERNS FOR SPECIAL EDUCATION

Federal, state, and local agencies have legal provisions or procedures to finance local educational programs and services. In recent years, the impact of reimbursement patterns has generated a great deal of attention. At issue is the impact of such reimbursement patterns on programs and services for handicapped children. Do such patterns promote or support appropriate or inappropriate programs and services for handicapped children? On the basis that each handicapped child should be educated in his or her least restrictive environment, the manner in which funds are allocated should not dictate the provision of services and should not reward inappropriate services. Some evidence, however, has been found which indicates that inappropriate programs and services have been fostered.

In this section, federal and state funding patterns will be described and critiqued as they relate to appropriate programing for exceptional children.

FEDERAL FUNDING PATTERNS

Federal aid provides programs for the direct education of handicapped students, instructional support, and research, (Kakalik et al., 1973). Methods of funding for these purposes may be classified as (a) full support, (b) partial assistance grants, (c) grants based upon formula, or (d) setaside.

Full Support

The federal government sponsors four schools for the deaf in order to provide a diversified educational program of high quality. Economies of scale prevent this at most state levels. Parts C and D of the Education of the Handicapped Act (EHA) are aimed at a specific disability or age group and provide regional model centers for deaf-blind children. An early education demonstration program for handicapped children is sponsored completely by the federal government. It also pays 90% of other experimental preschool programs.

Part G of the act supports model centers for children with specific learning disabilities, to include research and personnel training. Regional resource centers, which concentrate on curriculum development and to some extent on research and training personnel, aid the teacher in the classroom and are fully funded under EHA-C. EHA-F provides for centers to serve as clearinghouses of media and media related research. The American Printing House for the Blind manufactures books and other materials, and the Library of Congress operates a free loan service to other libraries of books and magazines in braille and on records. Programs that are completely funded are justified on the basis of economies of scale and the "internalization of externalities." (Internalization of externalities implies that strong arguments can be made for large federal expenditures rather than state or local spending on locally based projects where the entire nation or segments of the entire nation receive a benefit.)

Partial Assistance Grants

The Higher Education Amendments of 1968 (P.L. 90-575) provide grants to assist colleges and universities to develop programs for the disadvantaged in order to compensate for the underinvestment in this population group. Included in the definition of disadvantaged are students with physical handicaps. Part D of EHA makes available fellowship grants to students to pursue careers in special education and to colleges for program development. These grants recognize the national benefits derived from personnel training due to teacher mobility.

Formula Grants

Part B of the Education of the Handicapped Act (Title VI-B of ESEA) provides grants to the states based on the number of children in a state between the ages of 3 and 21 to support the initiation, expansion, or improvement of programs from preschool through high school. P.L. 89-313 amended Title I of the Elementary and Secondary Education Act. It provides grants to the states to support handicapped children in state operated or supported schools. The allocation is equal to 40% of average per pupil expenditure in a state or the nation, whichever is more, multiplied by the number of eligible handicapped children in average daily attendance in those schools. While EHA Part B is intended to stimulate programs and services through demonstration, the purpose of P.L. 89-313 is to redistribute resources and provide basic support to assist in the provision of adequate services.

Setaside

Title III of the Elementary and Secondary Education Act provides funds for the development and establishment of exemplary and innovative educational programs. The language of the legislation stipulates that 15% of a state's allotment must be spent on the education of the handicapped. Handicapped children must comprise 10% of the enrollment in the Headstart program. This does not mean, however, that 10% of the funds must be spent on the handicapped. The Vocational Educational Act of 1963 was amended in 1968 to provide that 10% of the funds allotted to each state must be spent on the handicapped in vocational educational programs.

STATE FUNDING PATTERNS

Attention has been directed in recent years to the various distribution patterns of state funds. At issue is the extent to which these programs support the needs of exceptional children. This is appropriately preceded here by a discussion of the relationship between general and special education finance, the objectives of state finance reforms, and criteria and development of special education funding.

Relationship Between General and Special Education Finance

Henderson (1973) offered a goal for special education finance which clearly emphasized the independence between general and special education finance:

> If each state is to reach the point where every school age child is receiving the best possible education in accordance with his needs, we will need to develop a program of financing special education programs to be developed throughout the state, regardless of variances in population density, prevalence of handicapping conditions, wealth of district, etc. Such special education financing must be carefully related to the general state school financing plan so as to prevent underpayment or overpayment of cost differentials of the special education programs.

Methods of funding should complement educational program policy decisions and, therefore, should be made subsequent to those policy decisions. When funding patterns are established in advance of policy decisions, there are usually adverse effects on service alternatives, resource configurations, placement, and administrative organization; for example, the existence of only segregated special education classes. Economic incentives influence local decisions. Comprehensive planning which considers policy, goals, programing, costs, fund needs, and allocation formulas in that order are encouraged (Bernstein, Hartman, Kirst, & Marshall, 1974).

Objectives of State Finance Reform

As has been repeatedly mentioned, special education will be significantly affected by state finance reforms. Hickrod, Yang, Hubbard, and Chandhari (1975) selected four criteria for evaluating Illinois finance reforms. The criteria, which are operational, measurable, and researchable, are (a) permissible variance, (b) fiscal neutrality, (c) reward for effort, and (d) aid to urban areas.

Permissible variance is based on the willingness of courts and legislatures to allow a certain amount of inequality in either the inputs or outputs of the educational process. This variance can be viewed in two ways. A coefficient of variation statistic may be employed which specifies a range of allowable inequality within an entire distribution of hypothetical per pupil expenditures. Those who argue that this promotes a regression to mediocrity might be amenable to the second approach—essentially a "leveling up" notion which focuses on the distribution below the median expenditure or arbitrary value. This allows "lighthouse" districts to expend higher amounts of money per child to promote higher levels of educational services and innovations which eventually trickle down to other districts. The first approach is egalitarian while the second is more libertarian.

Recent litigation over the inequality in educational opportunity created by state school finance programs (discussed in an earlier section) has generated the criterion of fiscal neutrality. It would appear that permissible variance could be viewed as a component of fiscal neutrality, since the intent of equality of educational opportunity has not necessarily been to eliminate a range of financial flexibility between districts, but rather to reduce the variability created by the wealth of individual districts. Variations due to local willingness to tax and to differences in the educational needs and cost of living between school districts are not prevented by the criterion. Two measures of fiscal neutrality have been posed: (a) The actual level of educational support must not correlate with wealth (*ex post* notion), and (b) the ability of a district to support schools should not depend on wealth; that is, a unit of effort must produce the same support everywhere (*ex ante* notion).

The third criterion, reward for effort or equal expenditure for equal effort, implies a permissible variance through local willingness to tax. However, tax rate is not synonymous with tax burden. Some educational agencies are able to shift the burden to local consumer sales and taxes on manufacturing enterprises. Therefore, conditions under which tax effort is exerted become the focal point of this criterion.

As recognized by Hickrod and his associates, the criterion of special aid to urban areas is a debatable one. It rests on the argument that urban areas need more financial assistance than do suburban or rural areas. One national study

(Rossmiller, 1971) supported the need for careful examination of revenues for education in urban areas:

> With regard to sources or revenue, the favored status of the suburban and small town categories with regard to revenue from state sources was evident in the analyses of the combined revenues of units of local government and was striking in the analyses of the revenue sources of school districts. This situation is undoubtedly the result of many factors—the reliance on property value as an index of fiscal capacity in existing state support programs, the relatively high ratio of school age children to total population in the suburbs, the lack of industrial and mercantile property in the tax base of suburbs and small towns, and the alleged dominance of state legislatures by rural legislators, and more recently by a coalition of rural and suburban legislators, to name only a few. (p. 398)

In order to accomplish these objectives of reform, state legislatures have enacted statutes aimed at equalizing educational opportunity, tax burdens, or both. As outlined by Musmanno and Stauffer (1974), four responses have been:

1. To equalize the financial resources of local districts to support specified levels of per pupil spending.
2. To shift school costs away from the property tax base to general state funds.
3. To change the techniques used for distributing state funds.
4. To reform or reduce the property tax.

Criteria for Special Education Funding

The total educational finance system must be compatible with the financing of special education, for the interdependence between the two has been emphasized repeatedly. In order for a total finance system to be equitable, it must provide the financial resources to meet the needs of all children throughout the state consistent with the educational policies of that state.

A financial delivery system for special education should also be comprehensive, flexible, accountable, and cost-effective, but it should avoid needless complexity (Bernstein et al., 1974). A delivery system is comprehensive if it accommodates the needs of the full range of type and severity of exceptionality. It is flexible if it can adapt to changes in the price which must be paid per unit of purchased resources over time and between place. A finance system should promote accountability in that program expenses should be traceable to the number of handicapped children served, the manner of funding, and the way resources are consumed by different program alternatives (delivery systems). A finance system should allow for flexibility in the way resources are mixed to provide delivery programs and services so that the optimal combination of resources may be consumed under particular and varied conditions. While a finance program must accommodate individual differences, it should avoid needless complexity so as to be manageable.

Thomas (1973a) asked some penetrating questions which have challenged present patterns of special education funding and clearly imply additional criteria with which to judge methods of funding:

1. Special education should be visible in the budget decision process at state and local levels so that the realities of financing programs and services for exceptional children are maximal in the political process.
2. School districts should have a recourse when the state is delinquent in its payment of allocations; adjustments should be made for meeting current expenses which may include the greater startup costs of new programs.
3. A financing system should support the use of regionalization, such as intermediate units and joint agreements to promote the development of programs in locales with a low incidence of exceptionalities.
4. The use of ancillary professional, noncertified personnel such as aides, and supervisors and administrators to assist faculty at all points along a continuum of services provided for exceptional children should be supported.
5. Funds should flow not only to the public school system, but also to other agencies providing appropriate educational services to exceptional children, where such services are planned and coordinated with those of the public school.
6. If in the future categorical funding to specific educational programs is replaced by general revenue sharing or block grants, assurances, through some auditing process, should exist that those funds will reach exceptional children.
7. A finance plan should allow for flexibility in the allocation of resources to exceptional children to facilitate individualized learning.
8. A support system should include sufficient funds for research and development activities, personnel training, demonstration

activities, evaluation analysis, needs assessment, capital outlay for expansion, transportation, coordination between agencies, and child identification and diagnosis activities.

The Development of Special Education Funding

The following is an abstract from "Alternative Methods of Financing Special Education," by William P. McClure (1975).

Prior to 1950, severely handicapped individuals were isolated from others in residential institutions. Early isolated public school programs for exceptional children were for children who possessed serious emotional, physical, or mental conditions. The programs were financed by categorical state aid to pay for extra costs incurred primarily due to small class size. Teachers of handicapped children often were offered bonuses as an incentive.

Sources of funding consisted of regular state funds for each child (including exceptional children), a flat dollar amount of state aid to pay for a portion of the salary of the special education teacher or a set percentage of the salary, and the remainder from local tax levies. In some cases dollar amounts to districts were varied by type of special education programs provided or were fixed above that received for regular programs. This took the place of salary supplements. Later, states began to subsidize partial special education costs of instructional materials, transportation, social workers, psychologists, diagnosticians, therapists, supervisors, and administrators. The level of funding or distribution process was not validated by special education cost analysis to determine adequacy or equity of funding.

Methods of Funding

Several methods of funding have been used by states to assist local educational agencies in financing programs and services for exceptional children: (a) unit basis, (b) weighted formula, (c) percentage reimbursement, (d) reimbursement for personnel, (e) straight sum reimbursement, and (f) excess cost formula (Thomas 1973a).

Unit basis. Some states reimburse a fixed sum on a unit basis whereby the unit is defined as a set number of children assigned to a special class. Districts will certify the number of students enrolled in special classes. A unit of funds may also be allocated for administration on the basis of one unit for a set number of classroom units. Units may also be apportioned for ancillary services.

If appropriated funds fall short of amounts required for full funding, that which is appropriated should be prorated. Otherwise, units for exceptional children, which have often been the last to be approved, may be without funding. In light of recent constitutional guarantees, however, the "no funding" issue should be of minimal concern now.

The growth of units for particular special programs have been limited in the past to a certain percentage annually, which inhibits the development of new exceptional child programs. This has promoted the development of special classes and has made resource room programs or special assistance in the regular classroom extremely difficult to reimburse. Other problems have been encountered in using the unit system (Thomas, 1973a):

1. Maximization of class size to decrease per pupil cost.
2. Inability of small school districts to generate enough special education classroom units to qualify for units for classroom ancillary services and administration.
3. Nonreimbursement of higher costs during the first year of a program.
4. Lack of funding in most states for costs incurred in mainstreaming.
5. Inappropriate placement of children in a program with a lower per pupil expenditure when units are allocated for differing class size on the basis of a child's disability.
6. Same reimbursement for all programs regardless of cost and/or quality.

Some of these problems may be overcome by the establishment of statutory limits on class size or by a guarantee to each district of at least one classroom unit for each category of exceptionality or of a unit to be shared with another district. Districts may also share ancillary service, administrative, and supervisory units. The dollar amount allocated with new units could be greater for the first year only.

Weighted formula. A state may elect to fund special education programs by using a system of weights, with the per pupil expenditure of the least expensive school program (regular elementary programs) serving as a base of 1. The regular per pupil expenditure multiplied by the weight for each category of program (e.g., 2.10) equals the amounts of funds received per child. This method conceptually allows for the full cost of special education programs in the general state aid formula.

A problem arises with the use of a weighted system when average state costs serve as the basis for the development of cost indices, rather than an individual cost index for each district. In some districts the allocation will be too large and in others it will not offset expenditures. There is also great variability in each child's needs within each category of exceptionality, generally associated with the severity of condition.

Florida has instituted a system of weights in its educational finance plan for 15 programs for exceptional students with cost factors ranging from 2.3 to 15.0 and the full time equivalent (FTE) as the basic revenue allocation unit. Although the plan is a significant improvement over its predecessor, there have been some adverse effects in the assignment of students and teachers, identification and classification of students, initiation and deletion of special programs, and provisions of programs in sparsely populated regions (Foshee, Garvue, & Newcomer, 1974).

A tendency existed to assign students to full time, self contained classrooms and away from resource rooms. Since an exceptional student who is reported in the self contained special classroom for a full five hours each day counts for a higher weighting, there was an increase in special education class size in all districts. It was argued, for example, that small numbers of speech impaired students were unable to generate enough funds to support a therapist. Others argued, however, that better diagnostic and evaluation services were now available and more students could be identified.

A trend toward hiring the least expensive teacher seemed to be surfacing. Since supervisory personnel positions do not generate FTE units, there was concern by supervisors over their job security.

Because exceptional students generate more funds than basic classroom students, a majority of diagnostic personnel reported receiving pressure from principals to identify as many students as possible. School psychologists have not had time to reevaluate students placed in special programs. The deadline for the initial FTE count was too early in the school year for the homebound program, and students were placed on special education membership roles after only preliminary screening. There was an increased incentive to assign borderline students to the highest weighted category.

Severely handicapped students (deaf, severely emotionally disturbed, orthopedically impaired, multiply handicapped) who require small caseload support services and teacher aides were not generating enough funds to support their program. Consequently, there has been a decrease in the number of special programs and a corresponding increase in class size, resulting in inappropriate placements. Adequate funds were not provided for new program start up costs to purchase equipment and materials. Since only direct pupil contact time generates FTE's, the reduction in pupil contact time caused by travel and materials preparation prohibited the generation of sufficient funds to support homebound instruction, itinerant programs for the visually handicapped, and speech therapy.

In small districts low incidence exceptionalities did not generate sufficient funds to support a class.

Several suggestions may avoid these adverse effects.

1. Criteria and procedures for identification, placement, and careful monitoring should insure appropriate student placement.
2. State regulations should establish reasonable maximum class sizes for each area of exceptionality.
3. Differentiated staffing patterns should be tested to ensure that highly trained teachers and supervisors do not fall victim to state funding systems which do not consider the training and experience of teachers in the distribution formula.
4. Practical reporting dates of special education membership for funding purposes should allow sufficient time for the proper referral, identification, evaluation, and assignment of students.
5. The cumulative counting over a period of time of students receiving homebound instruction might generate sufficient funding.
6. If an educational plan were drawn up for each exceptional child, this could serve as a basis for monitoring to ensure that the student is receiving appropriate services in the most appropriate setting.
7. Due to the difficulty in accounting for dollars generated on a school by school basis, greater flexibility may be provided by tracking dollars on a districtwide basis.

8. Cost indices for low incidence exceptionalities must be high enough to generate sufficient funds to operate a program within a single district or encourage multidistrict programs to enable the most efficient use of resources (economies of scale).
9. Implementation funds should be provided to aid in the development of new district programs.
10. Teacher travel time, parent and teacher contact hours, and instructional materials preparation should be included in the computation of FTE's, or the weightings for the homebound and itinerant visually handicapped categories should be increased.
11. Additional funding for support services to ensure proper diagnosis and assessment, casework, audiological services, development of specialized instructional materials, and consultative services should be considered.

Percentage reimbursement. A state may elect to allocate funds to districts using the percentage reimbursement pattern. If it does, it will reimburse a set percentage of all costs incurred in providing special education programs. Assuming that all costs may be accounted for, it overcomes some of the programing problems encountered in the previous methods. However, several drawbacks have been noted.

Since per pupil program costs vary, it will be less expensive to educate a child in one categorical program by using one delivery system than it will be using another. Thus, if the percentage that is reimbursed is low, a school district may still find its outlay in certain programs excessive. This will lead to inappropriate placements. From a state level viewpoint, without a per pupil expenditure cap, it would appear that the total allocated state dollars could be unlimited. However, the level of state appropriations necessarily sets a limit, and those funds are prorated on the basis of the percentage reimbursement formula.

Reimbursement for personnel. In this procedure, a set amount of money may be allocated to offset the costs of special education teachers, administrators and supervisors, pupil personnel workers, and other professional and noncertified support staff. A reimbursement program for personnel alone does not recognize all direct and indirect costs in special education, although it is conceded that personnel costs represent the single most critical factor in financing. The outlook for mainstreaming using this method of financing cannot be optimistic, since mainstreaming requires the presence of the exceptional child in the regular education program to the extent appropriate and those costs are not paid by the state when a child is counted either as an exceptional or normal child. Without class size limitations, local educational agencies may be encouraged to maximize class size to decrease per pupil expenditures.

Straight sum reimbursement. This form of reimbursement is simply a set amount of money, which may vary according to the exceptional condition, allocated per exceptional child served in each district. It has an advantage for local education agencies over the unit pattern since no set minimum number of served children is required before state monies are distributed. Straight sum reimbursements often have little relationship to realistic program costs. As with other patterns, there is a tendency to label children for fiscal advantage and maximize the size of classes.

Excess cost pattern. The excess cost pattern of funding special education exists in several states and is being considered by a number of others. Excess cost may be defined as the amount by which the per pupil expenditure for exceptional children exceeds the per pupil expenditure for all other children.

The total amount to be reimbursed would be that difference multiplied by the number of exceptional children. Depending on the level of funding, excess cost may be completely reimbursed, reimbursed up to a dollar amount ceiling, or reimbursed on a percentage or prorated basis. When the state is willing to appropriate sufficient funds to cover all excess costs,

> theoretically the district is encouraged to make the best placement for the child because doing so causes no extra financial burden. Prohibitive costs do not become a major factor in deterring a child from receiving the full range of services. When the payment, however, is a percentage of excess costs, the school districts encounter the same problem as that discussed under the percentage approach. (Thomas, 1973a, p. 477)

Difficulty is encountered in determining just what is excess cost and ensuring comparability between districts. Standardization between districts requires a common program cost and element format and accounting procedures necessary to calculate excess cost. Of special concern must be the problem of separating out the cost of educating exceptional children provided in mainstreamed settings, where exceptional children spend part or full time in regular classes with supplementary services provided in those settings. Also of concern is the allocation or proration of indirect costs.

If state regulations contain imprecise definitions of exceptional conditions, there will be great variability between districts in the manner of determining a child's eligibility for special education services. This will lead to the improper labeling of children and a financial advantage or disadvantage for some districts.

The reimbursement of excess cost has been viewed as a method whereby the state fully funds extra instructional costs of special education programs where the pupil, teacher, or size of the instructional group are units for determining excess cost. Excess cost could be funded by basing it on (a) state guidelines to determine actual allowances, (b) average excess costs of the preceding year in a sample of exemplary districts, or (c) state guaranteed (foundation) level of support for the current year.

Special reimbursements for noninstructional services and capital outlay. Noninstructional costs include transportation, food service, and other outlays for subsistence. Transportation costs are a function of the spread of pupil residence, number of special trips, the number of children transported, and the special assistance required of children who are transported. Some states fail to provide for transportation. This has resulted in contracting with taxi and bus companies, resulting in insufficient service and the inability to obtain specially modified equipment and facilitate the transportation of smaller groups of children. It would seem that, if transportation reimbursements are limited to cost incurred between home and school, important program activities involving travel to other locations, such as a work-study program, diagnostic services, and physical and other forms of therapy, will be denied. Residential school costs and welfare payments also vary as to exceptional condition.

Three methods have been used for funding noninstructional costs:

> Full state funding based on budget approval—this method will require guidelines for defining and evaluating needs; state funding of full cost allowances based on guidelines, with the local district having authority for minimal contingencies, which no set of guidelines or formulas can possibly estimate; state and local sharing based on a percentage of a fixed total, or some other arrangements. (McClure, 1975, pp. 47–49).

Capital public facilities for exceptional children take on several forms. They may be separate residential facilities operated at the state or regional level for the severely handicapped, separate day centers which may be attached to regular schools for some integrated student activities, or integrated new or modified (through renovation and additions) facilities within a regular school which have been designed to contain no architectural barriers by including ramps, elevators, special classrooms, rooms equipped for physical therapy, resource rooms, and equipment to accommodate the special needs of the handicapped.

Three alternative methods are mentioned to fund capital facilities. The state can assume the full cost for separate new facilities or renovations or additions to old buildings, or the state and local jurisdictions can share in the cost of arranging for integrated facilities using some equalization formula. The federal government has shared in the funding of some special educational facilities for severely handicapped pupils (McClure, 1975). Special funds for facilities without constraints have at times resulted in segregated facilities for handicapped children, thus reducing the prospects for their eventual integration into regular programs. Church basements or similar type facilities have been leased when facility support has been limited to rent.

Private school funding. States have made legal provision to support handicapped children in private schools when appropriate educational services are not available in public schools. Where the state has assumed the full tuition grant without requiring the participation of the local education agency, districts are relieved of an educational burden and, at the same time, are able to economize since they do not need to contribute to the child's education that sum which they would provide for a normal child. Therefore, there is no incentive to begin programs. This has resulted in more and more children attending private schools—contrary to the concept of education in the least restrictive alternative educational placement and the deinstitutionalization movement—and spiraling state costs.

States need to audit the budgets of private day and residential institutions to ensure that they are truly charging the state an honest price for a child's education and training. From an economic standpoint, states may want to reexamine the validity of continuing to send children to private institutions against the feasibility of developing and maintaining statewide, regional, and/or district operated programs.

Reimbursement for regional planning and programing. Regional or intermediate school districts exist in a number of states. They embrace the boundaries of several school districts and may serve to plan and coordinate and/or operate and provide educational programs and services. In some cases, as in Illinois, they exist solely to provide educational programs and services for exceptional children. This arrangement is particularly helpful when a district is not large enough to provide a needed service effectively or efficiently on its own, because it lacks the necessary resources or because there are only a few students in need of a particular service (low incidence of exceptionality). Regional programs and services have operated for the trainable mentally retarded, emotionally disturbed, physically handicapped, preschool exceptional child, gifted, homebound, and single or multiply handicapped child. Psychological or psychiatric services have been made available, as well as coordination of public and private health, welfare, and social agencies.

Wisconsin's 19 cooperative education service agencies (CESA's) are funded directly by state monies and by contributions from participating districts. The state provides the funds for general administrative operations. School districts participate voluntarily in programs they need and pay for services they use on a per capita basis. The state has since provided funds for a special education administrator to those CESA's desiring one. Initially it was a federally funded position, but the department of public instruction now picks up 70% of the salary. The remaining 30% is shared by the local education agencies. Special education services are subcontracted as the districts need such services.

Full state funding. A state may completely assume all instructional costs of special education. This is known as full state funding. In this method, local expenditures would be subject to state approval, based on guidelines which could range from rigidity with respect to local internal allocations to full discretion for local allocations. This method breaks from tradition since the state and local agencies have shared tax revenues to provide education. It also violates a sense of local control of schools as perceived by the American public.

Categorical versus noncategorical funding. Categorical funding may be defined as an approach which earmarks specific allocations to programs for exceptional children. Noncategorical funding does not earmark funds to exceptional children, but those funds are included in general education funding.

There is great variability in the definitions of exceptional conditions and leeway in interpretations of the definitions through eligibility criteria for placement. Some children may even be mislabeled and placed in an inappropriate educational setting in order for a district to gain a fiscal advantage when more funds are received from the state for exceptional children than for regular children. Children may also be mislabeled to gain a fiscal advantage when certain categories of exceptionality are funded at a higher level than others.

Categorical funding has promoted the isolation of exceptional children when regular services to those children are not supported by funds for regular education, or when children in full time special class placements receive greater funding than those children who spend only part time in those classes. A system could still be categorical if it provided funds for special educational services, rather than funds to individuals in need of special education.

In noncategorical funding arrangements, when funds for exceptional children are included in general funding for use by special education, the local educational agency is in a position to direct some of those funds to other educational programs unless a strict accounting of the use of those funds for special education is required.

A Reimbursement Pattern to Support the Needs of Children

Basic to the purpose of any educational funding system should be its concern for providing economic resources to back up the assessed individual needs of each child. Once that need is established, funds should be granted to support a delivery system that will meet a child's needs.

The pattern of categorical funding for the support of programs to a target population of children, such as the handicapped, tends to maintain an exclusive system when only handicapped children are eligible to receive special education services. Although special education services exist for categories of handicapped children, there is every reason to believe that, from time to time, normal children might benefit from special educational services from which they are presently excluded. The converse is already becoming a reality as more and more handicapped children are using the services provided in regular programing. The normal child should be able to use appropriate services offered by special education.

Ultimately, a continuum of special education services should be available for all children for as short or long a time as necessary when those services are deemed appropriate. However, until such time as the vulnerability of handicapped children in education is no longer an issue, funds should flow to handicapped children rather than directly to programs and services, so that appropriate special educational services may be purchased (Marinelli, 1975).

IV. THE THREE LEVELS OF GOVERNMENT AND FUNDING FOR SPECIAL EDUCATION

Educational operations are established for the federal, state, and local governments within a framework of constitutional provision and statutory enactments, thereby operating within a well defined legal structure. Although education is legally the responsibility and fundamental concern of the individual states, state action must be exercised in a manner consistent with requirements of the US Constitution.

FEDERAL GOVERNMENT

The powers of the federal government extend to those areas which are delegated and enumerated in the US Constitution. The 10th Amendment to the Constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the state, are reserved to the states respectively, or to the people."

The role of the federal government in the field of education, however, has been a source of controversy, for the general welfare clause has been interpreted broadly to permit its participation in the field of education. However, education is not one of the powers explicitly delegated to the federal government.

Categorical versus Block Grants

Despite efforts to pass general purpose grant funding to states in order to supplement state and local school tax revenues and to minimize federal direction and control of the educational process, narrowly defined categorical grant programs have mushroomed. Since categorical programs have been justified as contributing to important national goals and assisting in the financing of selected high cost programs on a continuing basis, they will remain on the scene for some time. Education finance specialists have recommended the consolidation of continuing categorical aids into a few major blocks: (a) vocational education, (b) education of children from low income families, (c) compensation to schools for federal tax exempt property, (d) education of handicapped children, (e) school food service, and (f) educational research and development (Johns & Lindman, 1972). US Education Commissioner Bell has also singled out the education of handicapped children as a federal educational priority (Bell, 1974). Federal grants for vocational education, compensatory education, special education, and research and development have not been sufficient to produce needed improvements in elementary and secondary education, so that federal action has been needed to increase general purpose income available for schools in addition to block grants for several purposes: (a) to equalize educational opportunity among the states, (b) to transfer the administration and control of federal aid from Washington to the states, (c) to relieve the state and local tax burdens of all states, (d) to stimulate or at least preserve state and local effort to finance education, and (e) to develop a plan which is politically acceptable in all or most states (Johns & Lindman, 1972).

Catalytic Nature of Programs

The federal role has been primarily catalytic in nature. It has encouraged innovation and stimulated programs and services (see Table 5).

The redistribution of resources from one population group to another, for example, from wealthy states to poorer states (or individuals), has increased the equity of service delivery and increased the total productivity of society. State and local program development as an investment in the education of the handicapped has been stimulated in order to overcome expen-

Table 5

Summary of Fiscal Year 1972 Federal Special Education Expenditures, by Function

Function	*Percent of expenditures*
Redistribution of resources	9.0
Stimulation	44.2
Provision of services	
Economies of scale	11.1
Internalized externalities	17.8
Basic service support	17.9

Note. From *Services for Handicapped Youth: A Program Overview* (HEW Grant No. HEW-SO-72-101), by J. S. Kakalik et al., Santa Monica, CA: Rand, 1973.

sive start up costs. It has been used for demonstration projects, matching grants, and dissemination of information.

Some services have been more justifiable at the federal level because of economies of scale in the production of quality education for the handicapped, especially for low incidence population groups. Significant externalities may best be internalized at the federal level, such as research on educational techniques or the prevention of various types of handicaps, because they have national benefits. One state's investment in this endeavor may be inadequate, or the benefits of the investment may not flow to other states. When the federal government undertakes basic financial responsibility of special education services, it is offered because there exists a major unmet need and states are budgetarily constrained from meeting the need, or because minorities can exert greater pressure at the federal level where they can become powerful lobbies (Kakalik et al., 1973).

Federal Expenditures

According to the best estimates available, $315 million were spent for educating the handicapped in fiscal year 1972, with 78.1% allocated to the direct support of the education of handicapped children, 18.4% to the support of instruction through teacher training and media services, and 3.5% to research.

The federal government contributes 12% of the cost of special education, approximately 7% of which pays for the total national expenditures for elementary and secondary education. The conclusion is that the percentage of expenditures borne by the federal government in support of the education of the handicapped is small in comparison to the size of both the total federal, state, and local special and regular program expenditures (Kakalik et al., 1973). Table 6 summarizes expenditures by federal function. Table 7 illustrates that, by and large, federal expenditures are not allocated on the basis of disability.

Whereas previous "aid to the states" appropriations were $47.5 million in 1974 (P.L. 93-192) and $99.6 million in 1975 (P.L. 93-554), P.L. 94-142 passed by the 94th Congress would increase the "aid to the states" entitlement to between $2 billion and $3 billion for educating handicapped children, the emphasis being on the development of programs for previously unserved handicapped children (P.L. 94-142, 1975). US Senators Harrison Williams and Robert Stafford have referred to this law as a "second generation" of federal support for handicapped children (US Congress, 1973).

Compliance and National Goals

Federal funds that are allocated to the states will continue to have strings attached to them. An examination of the language in Title VI-B of the Education Amendments of 1974 will attest to that. Although education is a function constitutionally reserved to the states, it is clear from the language in Title VI-B and its supporting regulations that the provision of an appropriate education for all handicapped children is now a national goal. It is required (P.L. 94-142, 1975) that states provide some assurances, through their local educational agencies, in order to receive these funds. These assurances include:

1. A guarantee of free appropriate education, whether public or private, for all handicapped children.
2. A priority to use the funds for providing education to those presently unserved and those with the most severe handicaps.
3. An individual written and annually reviewed educational plan for each handicapped child.
4. The use of due process procedures in decisions affecting the identification, evaluation, and educational placement of the child in the least restrictive environment—a place-

Table 6

Fiscal Year 1972 Federal Funds for Education of the Handicapped (In Millions of Dollars)

			Provision of services			
Program	*Budget (Fiscal Year 1972)*	*Redistribution of resources*	*Stimulation*	*Economy of scale*	*Internalize externalities*	*Basic service support*
Education	245.966	......	......	......	......	......
EHA-B	37.500	......	37.500	......	......	......
ESEA–Title I						
Local education agencies	28.000	28.000	......	......	......	......
89-313	56.381	......	......	......	......	56.381
ESEA–Title III	20.100	......	20.100	......	......	......
Headstart	33.384	......	33.384	......	......	......
Vocational Education Act	38.384	......	38.384	......	......	......
Higher Education Act	0.436	0.436	......	......	......	......
Federal schools for deaf						
Gallaudet College	7.888	......	......	7.888	......	......
NTI for Deaf	2.907	......	......	2.907	......	......
Kendall School	1.212	......	......	......	1.212	......
Model Secondary School	2.524	......	......	......	2.524	......
Special target groups						
Deaf-blind centers	7.500	......	......	7.500	......	......
Early education	7.500	......	7.500	......	......	......
Learning disabilities (EHA-G)	2.250	......	2.250	......	......	......
Instructional support	57.906	......	......	......	......	......
Teaching personnel						
EHA-D	35.145	......	......	......	35.145	......
Education Professions Development Act	6.100	......	......	......	6.100	......
Regional resource centers (EHA-C)	3.550	......	......	3.550	......	......
Media						
EHA-F	10.500	......	......	10.500	......	......
American Printing House for the Blind	1.580	......	......	1.580	......	......
Library of Congress	1.031	......	......	1.031	......	......
Research	10.994	......	......	......	......	......
Research (EHA-E)	10.994	......	......	......	10.994	......
Total	314.866	28.436	139.110	34.956	55.975	56.381
Percent	100.0	9.0	44.2	11.1	17.8	17.9

Note. From *Services for Handicapped Youth: A Program Overview* (HEW Grant No. HEW-SO-72-101), by J. S. Kakalik et al., Santa Monica, CA: Rand, 1973.

ment which must not be culturally or racially restrictive.

5. Nondiscriminatory testing in placement.
6. Procedures for the development of a comprehensive system of personnel development and inservice training.

A mechanism for monitoring the compliance of those states that elect to receive funds is imminent. Legislative oversight in the use of its funds is becoming a more critical activity of the Congress.

The federal concern over the proper use of its

Table 7

Federal Expenditures on Education of the Handicapped

Type of handicap	*Expenditures*
Blind (American Printing House for the Blind)	$ 1,580,000
Deaf (federal schools for the deaf)	14,531,000
Deaf-blind (model centers for the deaf-blind)	7,500,000
Learning disabled	2,250,000
Noncategorical for type of disability	289,005,000

Note. From *Services for Handicapped Youth: A Program Overview* (HEW Grant No. HEW-SO-72-101), by J. S. Kakalik et al., Santa Monica, CA: Rand, 1973.

funds is not without some justification. The federal impact on behalf of handicapped children as a result of the 1968 amendments to the Vocational Education Act exemplifies the reason for this concern. The 1968 amendments provided that 10% of funds going to each state under the basic matching grant program (Part B of the amendments) were to be used for programs "for handicapped persons, who because of their handicapping condition cannot succeed in the regular education programs without special educational assistance or who require a modified educational program" (P.L. 90-576).

In 17 states, there were virtually no differences between total expenditures for the handicapped and expenditures under the 10% setaside program. In all but a few states, the differences were not significant (USHEW Office of Planning, Budgeting, & Evaluation, 1974). A report of November 1973, prepared for the National Advisory Council on Vocational Education, stated flatly that only 2.49% of total federal, state, and local vocational education funds were spent during the 1971-1972 school year on handicapped persons, despite the fact that such children and youth are generally estimated to comprise 10% of the public school age population (Lee & Sartin, 1973). A recent General Accounting Office report submitted to the Congress (Comptroller General, 1974) found that the states failed to provide matching funds in any significant way as substantiated by the following findings:

1. An overall average of 11% was spent for the handicapped.
2. No state over a four year period has supported efforts for the disadvantaged and handicapped to the same extent as its overall Part B program.
3. While the nationwide average ratio of state and local funding for all Part B programs in fiscal year 1973 was $5.93 to $1.00, the ratio for programs serving the handicapped was only $1.10 to $1.00.
4. In fiscal year 1973, 19 states spent fewer state and local dollars for every federal dollar for the handicapped than they had in fiscal year 1970.
5. Some states, over a three year period, have spent no state or local funds for the handicapped while continuing to receive federal assistance for such programs.
6. In other states, state and local funding has been withdrawn as federal funding has increased.

US Office of Education statistics show that the proportion of the handicapped enrolled declined relative to total enrollments from fiscal year 1971 to fiscal year 1973. During the same period, the federal portion of expenditures for the handicapped increased relative to total expenditure growth. From fiscal year 1972 to fiscal year 1973 enrollment of the handicapped declined in 15 states, despite increased expenditures (Comptroller General, 1974).

The legislative history attendant to P.L. 90-576, the Vocational Education Amendment of 1968, gave forceful emphasis to two factors: (a) that there be a broad range of vocational opportunities for the handicapped, and (b) that vocational education facilities be so modified as to enable handicapped persons to receive vocational education along with their nonhandicapped peers.

The Council for Exceptional Children reviewed vocational education programs for the handicapped and found the vast majority to be self contained and to offer limited vocational options (Weintraub, undated).

Congressional concern over the apparent resistance by states to achieving certain national goals is evident when one examines the conclusions that are drawn from this information:

1. The apparent failure of many of the states to "match up" with their own resources in any significant manner.
2. The correspondingly low percentage of total vocational education monies assigned to the handicapped.

3. The obvious absence of a catalytic impact in the 10% setaside for the handicapped.
4. Sliding enrollments concomitant with escalating federal expenditures.
5. Failure to integrate, whenever possible, handicapped and nonhandicapped vocational education programs.
6. The absence in too many instances of a full range of vocational education opportunities.
7. The absence of coordinated, comprehensive planning toward the best use of resources for all.

STATE AND LOCAL GOVERNMENTS

State and local governments have traditionally played a partnership role in financing educational programs. Education is a state function and local school districts are agents of the state charged with carrying out educational responsibilities. The role that each district plays in financing education varies from state to state.

State and Local Expenditures

The task of accurately determining state and local outlays of funds for the education of exceptional children is a difficult one. Comparable and reliable data which cut across states and local districts are simply not available. As more and more children are mainstreamed, the tasks of separating out the costs incurred by exceptional children who spend part or full time in the regular classroom and of estimating costs become more difficult. Definitions of handicapping conditions for program eligibility and of direct and indirect costs are subject to different interpretations. Methods of allocating or prorating costs vary between and among local and state educational agencies.

Be that as it may, the Rand Corporation reported that approximately $2.4 billion was expended nationwide on the education of handicapped children during the 1972–1973 school year. The information was based on an annual report submitted to the Bureau of Education for the Handicapped by the 50 states. Of that amount, $1.1 billion or 46% was expended on programs for the mentally retarded. This amount provided services for only 59% of the handicapped.

The estimated average expenditure per handicapped child during that year was $776. It must be added, however, that local and state variations were wide. Another measure of effort is the amount spent on the education of handicapped children in comparison to the total number of children (handicapped and nonhandicapped) in a school system. This figure adjusts for handicapped students who are enrolled in public schools, but are not being served. On this basis, only $44 is spent on the handicapped in average daily attendance as compared to $858 for the average expenditure in elementary and secondary education (Kakalik et al., 1973).

Using data derived from state education agency estimates of the handicapped population for school year 1971–1972, from estimates of projected enrollments for school year 1972–1973, and from Rand data on per pupil cost, an annual expenditure of an additional $3 billion would be needed to educate all handicapped children in the United States. It must be remembered that the above data is oblivious to program quality and appropriateness.

The Rand Corporation proposed that several determinants are at work in affecting the per pupil spending on education. Researchers collected data at the state level. A multiple linear regression model was employed to statistically examine predictor-level of spending relationships. Per capita income was by far the most significant predictor. The existence of legislation mandating special education services was statistically significant, but a weak predictor. The population density, inferring economies of scale considerations, did not show up as significant. These data, however, should have been aggregated at the local level. Income was also highly correlated with the ratio of special education expenditures to total current expenditures on the total school program, suggesting that "not only do high income states pay more for special education, but they also give it more emphasis relative to regular education" (Kakalik et al., 1973, p. 123).

The Role of State and Local Government

While the role of the federal government may be to guarantee equal access to educational programs and fiscal resources and to provide supplementary funds to guarantee the provision for programs in the national interest, education is the responsibility of the individual states. Thus a state must take it on itself to assure sufficient funds in each district to adequately operate educational programs in a way which equalizes the tax burden upon each district. The state must provide fiscal incentives for the improvement of educational programs where needed.

In this regard, the President's Commission on School Finance (Karsh, 1972) has made several recommendations:

1. A gradual phasing out of local revenues to be supplanted by increased state revenue.
2. State budgeting and allocation criteria which consider variations in program costs commensurate with educational needs.
3. An allowance of local contribution to supplement up to 10% of state allocations.
4. A federal financial contribution to states to facilitate the replacement of local tax revenues in moving toward full state funding.

In light of the emerging roles and suggestions of the three levels of government, the commission made the following recommendation:

> The cost of educating an exceptional child, beyond that amount which is contributed from local revenue in the state-local partnership to educate a nonexceptional child, should be assumed by state government. Federal funds should supplement the state's financial effort to guarantee full and equal educational opportunity to all exceptional children.

In addition to the issue of responsibility, Rossmiller (1974) pointed out that a state, by its financing scheme, can either facilitate creative special education delivery systems or continue to promote ineffective and outmoded delivery systems or deny handicapped children access to such programs. Consistent with this concern The Council for Exceptional Children (Weintraub et al., 1971) has recommended that:

> Laws regulating state reimbursement for the education of handicapped children be broad enough to allow for flexible programing to meet the unique needs of each handicapped child, and that such funding be tied to a state approved plan for which the state and the district can be held accountable. Such a plan and subsequent reimbursement should include provision for, but not limited to, instructional services, administration, transportation, facilities, and personnel for all handicapped children, whether they be located in public day schools, state schools or institutions, hospitals, homes, private schools, or any other facility. (p. 65)

V. PROGRAMING, PLANNING, AND BUDGETING FOR SPECIAL EDUCATION

Planning, programing, and budgeting (PPB) systems have significant implications for the financial planning of special education at the local level. Among its many purposes, PPB provides a systematic procedure for (a) searching for alternative means to achieve prioritized goals and objectives for exceptional children most effectively and efficiently, (b) estimating short and long range cost projections, and (c) measuring program performance to ensure a dollar's worth of service for each dollar spent.

PPB, a concept in systems analysis, is a method which allows for the distribution of special education funds among any number of its specific programs. Programs are activities which have unique objectives. If a local educational agency does not use the PPB system, a special education department may still elect to make internal resource allocation decisions using the PPB framework. The results may then be converted into the familiar line-item format to meet local educational agency requirements.

Much of the following information has been developed from a case prepared by Graeme M. Taylor of Management Analysis Center, Inc., on behalf of the Bureau of Training, US Civil Service Commission, and the Bureau of Education for the Handicapped, US Office of Education, Department of Health, Education, and Welfare.

PLANNING

In the planning phase of PPB, studies are conducted and reports are prepared on the impact that environmental factors will have on policy implications and financing of the education of exceptional children. This is followed by analyses of alternative goals and objectives for exceptional children.

Studies are conducted of demographic, social, legal, economic, and political factors. Demographic and social factors should include the distribution of the population as it alters the district's student enrollment and economies of scale. Characteristics of the population to be examined are trends in birth rate, the status of exceptional children in the area as a productive market, socioeconomic composition, and the differential needs of all exceptional children and requisite differential educational costs.

Social attitudes and objectives are a function of the social system's concept of deviance and social reforms, manifested in economic investment in the handicapped. Litigation has been a critical avenue for change. Issues such as the right of the handicapped to an education and the question of who will pay for their education in an appropriate setting have direct relation to the nature and level of funding. The concept *equalization of educational opportunity,* as interpreted by the courts and state legislatures in the form of educational finance standards, also impacts upon financial planning.

Obviously economic factors play a major role in financial projections. Some of the economic considerations in the planning phase of PPB include the level of interest in the economic aspects of education in general and special education in particular, the public's desire for efficiency and productivity in school operations, the effect on education of general conditions in the economy, and the federal, state, and local partnership in sharing the expenses of educating exceptional children. The nature and level of governmental funding for special education will depend on the relationship between general and special education finance, the objectives of recent state finance reforms, criteria used for special education funding, and methods of funding.

The political process allocates scarce resources. Demographic, social, legal, and economic factors are screened through the political process. This information is used by lawmakers to legitimize their actions. Thus the nature and strength of interest groups who provide information and political support or opposition, and the disposition of lawmakers, are significant political factors.

From the studies, reports, and analyses, projections can be made of government revenues and budgets as fiscal constraints on agency plans. A multiple year plan is then developed for achieving goals or objectives.

PROGRAMING

The programing aspect of PPB involves several steps. The first step is the development of a program structure for analytical purposes. The structure organizes programs together with similar objectives. Major policy issues are then identified. Subsequent to issue development is program evaluation which provides cost, output, and social impact data.

The cost structure should depend on the analytical purposes for which such a model will be used; that is, sensitive to cost variations between delivery system and severity and type of exceptionality, or sensitive to cost variations between special and regular education. The costs of each exceptional program—its functions (activities), organizational units, or individual resources—can be analyzed. The magnitude of costs can be linked to the severity of exceptional condition or to different delivery systems which are employed within categories of exceptionality.

Any one of several techniques can be employed for determining special education costs. An excess cost approach may be employed which is based on (a) the current best practice of programs within the jurisdiction of a local educational agency, (b) a step by step documentation of need for each potentially employable type of delivery system, or (c) an accounting model.

The last aspect of programing is the bringing together of all data relative to the major policy issue in a summary of the analysis and recommendations for broad program decisions.

BUDGETING

Budgeting involves the preparation and submission of program budget requests of the department of special education, along with program justification. The department's budget request is reviewed along with those of other organizational units. A school district budget and its justification is prepared and presented to the school board for its review, amendments, and/or approval. The approved budgets of all organizational units including special education are tracked by the actual performance in reaching planned objectives.

DOCUMENTING PPB

PPB requires documentation for strategic decisions recommended for the budget year. The document, known as a program memorandum, includes a statement of specified major program issues, a comparison of the cost and effectiveness of alternatives for resolving those issues in relation to objectives, and special education departmental recommendations on programs to be carried out and the reasons for those decisions.

Special analytical studies are components of the entire process, and their results become part of the program memorandum to justify recommendations. Some studies can be initiated and completed in one year, while others continue over several budget years and provide improved data.

While program memorandums deal primarily with the resolution of specified program issues, a program and financial plan is the basic planning document for special education. It contains a summary of departmental programs extending over several years and a continuing record of program outputs, costs, and financing needs. In a sense, the program and financial plan serves as the vehicle for summarizing all program recommendations for budget reviews.

Traditionally, budget figures are grouped by "line items" or "objects of expenditures," such as personnel services, travel, and supplies. When using a PPB system, however, a program structure groups budgetary information according to objectives and goals. Activities are grouped which have common objectives or outputs. There are three levels of classifications and requisite criteria: program categories, program subcategories, and program elements.

Program categories. The categories in a program structure should provide a suitable framework for considering and resolving major questions of mission and scale of operations which are a proper subject for decision at higher levels of management within a local educational agency; for example: Improvement of Curriculum and Instruction in Local Schools.

Program subcategories. Subcategories should provide a meaningful substantive breakdown of program categories and should group program elements producing outputs which have a high degree of similarity; for example: Improvement of Education for the Exceptional Child (This program subcategory is assigned to the department of special education).

Program elements. A program element covers special education departmental activities related directly to the production of discrete output or a group of related outputs which are departmental responsibility. Departmental activities which contribute directly to the output should be included in the program element, even though they may be financed from different appropriations or conducted within other school district departments or by other school districts, government agencies, or private schools serving exceptional children. An example of a program element might be: Education of Emotionally Disturbed.

A program element is tied to an end product which is measurable. The output should not be an intermediate product that supports another element. It should be expected that by increasing the amount of resources (costs) of a program element, the level of output will increase.

Treatment of Support and Indirect Activities

It is suggested that the costs of support and indirect activities not be arbitrarily allocated to a program structure simply to distribute all costs. The activities of supervisors of special education and other support personnel are allocated to several program elements on a justifiable basis unless 100% of their time is spent in one program element. If no justifiable basis exists or if the allocation does not contribute to more effective decision making in budget review, a separate element should reflect these activities.

Adaptation of Program Structure to Decision Making Needs

Where services are provided to a specific target group of exceptional students that is an important focus of decision making, it will be wise to consider establishing a unique program element within a subcategory and category predominantly involved, unless significant distortions of other components of the program structure will occur. If specific overhead, administrative, or support activities are significant in and of themselves, but when distributed among program elements do not affect decisions with respect to those elements, then no allocation should occur. Small appropriations should be totally allocated to that element into which the costs predominantly occur to avoid the excessive fragmentation of appropriations and organizations, again unless decision making would be altered due to that determination.

DESIGNING THE PROGRAM STRUCTURE

The program structure integrates budgetary information by common objectives or outputs. Several steps are undertaken to design a program structure, and several alternative structures are available as examples.

Steps in Design

Generally the school district has developed a statement of broad goals and objectives, which serves as the title of the program categories of the program structure, and has chosen the number of structural levels. The first task for personnel of a special education department is to choose the number of subordinate levels. It is suggested that more than four levels may create more detail than is necessary for planning purposes. The statement of mission oriented objectives (rather than process objectives) required for program structure design should be convertible into objectives which are analytically based and measurable.

After a structure of objectives and subobjectives is established, activities which contribute to each subobjective are grouped. Each activity is usually a program element. The scope, coverage, and content of each component is clarified by attaching labels and descriptive statements for each structural component. The steps do not necessarily have to be performed sequentially. For instance, tentative descriptive statements may assist in grouping activities (elements), or a schedule of activity statements may help to formulate precise statements of objectives.

Since an objective may be subdivided along several structural dimensions, the dimension which is of primary concern in allocation of resource decisions should prevail. Subcategory classifications can be structured by distinguishing complementary from competing programs. Competing programs are alternative means of achieving an objective and compete for scarce resources, whereas complementary programs are closely related since an increase in the activities of one leads to an increase in the activities of the other.

Examples of Alternative Structures

Several alternative dimensions exist for designing a special education program structure and collecting all costs: by exceptionality, by age group, by decentralized administrative areas of the school district, by fund source, by program function, by broad objectives, or by delivery systems.

Category of exceptionality

1. Blind and visually handicapped
2. Deaf and hard of hearing
3. Speech impaired
4. Orthopedically handicapped
5. Emotionally disturbed
6. Educable mentally retarded
7. Trainable mentally retarded
8. Special learning disabled
9. Multiply handicapped
10. Gifted
11. Homebound and hospitalized
12. Administration of the department of special education (refers to general administrative costs which are best identified with a central administrative unit for all the above areas)

Age of children being served

1. Preschool
2. Elementary
3. Secondary
4. Vocational education and rehabilitation
5. Administration of the department of special education

Decentralized administrative areas of the school districts

1. Northeast area
2. North central area
3. Northwest area
4. Southeast area
5. South central area
6. Southwest area
7. Administration of the department of special education at the district level

Program functions

1. Identification, screening and diagnosis
2. Educational planning and placement
3. Individual instructional services
4. Homebound instruction
5. Tuition at private institutions
6. Transportation
7. Meals
8. Teacher training and certification
9. Medical services
10. Research and evaluation
11. Title VI projects of the Elementary and Secondary Education Act
12. Curriculum development
13. Parent education
14. Public information services
15. Physical education
16. Administration of the department of special education

Broad objectives for exceptional children

1. Promote general learning (basic skills and attitudes)
2. Promote social adjustment
3. Promote specialized (career) skills

4. Promote understanding on the part of the community
5. Remove barriers to the acceptance of the handicapped in the community
6. Administration of the department of special education

Delivery systems for exceptional children

1. Regular classroom
2. Regular classroom with consultation
3. Regular classroom with supplementary teaching or treatment
4. Regular classroom plus resource room service
5. Part time special class
6. Full time special class
7. Special day school
8. Residential school
9. Hospital school
10. Hospitals and treatment centers

If the special education program structure is designed as part of the entire local educational agency's structure, then it may take the form shown in the following example, where only applicable program categories, program subcategories, and program elements are represented.

I. Improvement of curriculum and instruction in local schools
  A. Improvement of education for the exceptional child
    1. Education of blind and visually handicapped
    2. Education of deaf and hard of hearing
    3. Education of speech impaired
    4. Education of orthopedically handicapped
    5. Education of emotionally disturbed
    6. Education of educable mentally retarded
    7. Education of trainable mentally retarded
    8. Education of special learning disabled
    9. Education of multiply handicapped
    10. Education of the gifted
    11. Education of homebound and hospitalized
    12. Other aids for professional staff
    13. Administration of special education Title VI aids to localities
II Improvement of educational resources for schools
  A. Improvement of teaching resources
    1. Inservice education in the education of exceptional children
  B. General financial support
    1. Foster home children tuition
III. Improvement of instructionally related supporting services
  A. Transportation aids and services
  B. Medical services
    1. Consultation and other
    2. Aids to orthopedic schools
    3. Medical and rehabilitation
    4. Handicapped administration

COORDINATING INTERAGENCY AND INTRA-AGENCY PPB ACTIVITIES

Since the special education department of a local educational agency is not the only agency or organization planning and providing education and related services, it is imperative to coordinate the district's PPB activities with those other groups. State schools for the blind and the deaf may be operated by an agency which governs hospitals and institutions. Departments of mental health and vocational rehabilitation perform research and provide counseling and other out-patient services. Private and parochial schools operate special education programs. Private institutions exist for the mentally ill. Voluntary statewide groups, such as the local chapter or state federation of The Council for Exceptional Children, and local service clubs provide numerous services. Colleges and universities offer professional preparation programs in special education. Other departments operated by the local educational agency offer programs and services to the exceptional child, such as regular curriculum and instruction, pupil personnel services, and vocational education.

Coordination can be encouraged by any one of a number of different mechanisms:

1. A strong program concept of statewide significance which will serve as a focal point for coordinated effort.
2. Legislation and school board policy.
3. Functional reorganization.
4. Creation of local and statewide advisory groups on services to exceptional children.
5. Interdepartmental and interagency coordinating committees.
6. An ad hoc task force under chairmanship of a person with coordinating authority.
7. Centers for coordination in each department.

8. Preparation of local and statewide plans for exceptional children.
9. Program coordination in the school districts by operating personnel.

CONCLUSION

As has been mentioned, the subject of special education finance is a critical one in dealing with the provision of an appropriate education for all exceptional children. In order for dollars to reach an exceptional child, they must first be subjected to interdependent environmental factors. A student's needs must be accurately reflected in the determination of the costs of providing programs and services. The manner in which funds are distributed, the level of funding, and federal-state-local relationships will significantly affect the quality of educational programs. The use of systems techniques should assist in the more effective and efficient consumption of financial resources.

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CEC
Model Statutes

□ Every state has a comprehensive school law. It covers the organization and functions of the one or more state education agencies, qualifications for teachers and other school professionals, state-local relations, local public school systems, the role of private schools, and compulsory school attendance.

For normal children, the regular school law is a sufficient and generally all inclusive legal basis for the free public education they receive, or a prescription of the conditions under which they may substitute private schooling.

For the handicapped, supplementary provisions are necessary. Children who have many kinds of physical, mental, emotional, or learning impairments frequently can function in the regular public school setting only if certain aids and auxiliary services designed to ameliorate or overcome the impediments imposed by their handicaps are supplied. In other instances, special environments are needed to enable the handicapped to secure the equivalent of what most children receive entirely from the regular programs or, where this is impracticable, to receive education suited to their conditions and needs. Laws in every state related to special education provide the basis on which the handicapped gain access to the free public education which is the responsibility of the state to provide.

The following pages contain a comprehensive set of model statutory provisions designed to provide a full legal basis for practicable and effective programs of education for handicapped children. The intention is that they should be considered by states wishing to revise or update their laws relating to the education of the handicapped. Since this group of children is part of the population to which the comprehensive state school law applies and should continue to apply, the models are designed for incorporation into that law.

States considering a major overhaul of their education statutes may wish to regard the models taken in their entirety as a complete set of provisions relating to special education for the handicapped. Other states may wish to consider some of the individual provisions for addition to the existing statutes or as substitutions for particular provisions needing improvement.

The materials are presented in a number of distinct parts. The first of them is brief and applies to all children. It is a compulsory school attendance law in two short sections. It is included because one of the most serious problems in attempting to secure education for the handicapped is the tendency to excuse children with special problems from the requirements of regular school attendance. Statutes which condone or provide for such a course signal a failure of the public educational system to reach large groups of children for which it is intended. In many cases, they also contravene statutory or constitutional provisions which purport to afford education for all.

The other parts are arranged as a title of a comprehensive state school law. This title relates to special education for the handicapped. It does not replace the regular school law but is a supplement to it.

Brackets [ ] are used to set off alternative language or to indicate areas for insertion of appropriate existing state law or policy.

MODEL COMPULSORY SCHOOL ATTENDANCE LAW

Section 1.

School Attendance and Instruction Required

All children between the ages of [   ] and

[ ] shall attend the public schools, or such other schools as may be approved by the [state education agency] for the purposes of satisfying compulsory school attendance requirements, and shall receive instruction therein.

Section 2.

Programs of Instruction

(a) No child shall be exempt from the requirements of Section 1 hereof, nor shall the authorities legally charged with responsibility for the education of children be relieved from the obligation to provide suitable instruction. The public school authorities shall provide such special programs of education, corrective and related services as may be appropriate to enable all children of the following classes to meet the requirements of Section 1 of this Act:

1. Children who are unable to benefit sufficiently from the regular programs of instruction by reason of their mental, physical, emotional or learning problems, or for any other reason.
2. Children whose degree or kind of disability or illness precludes attendance in a regular school setting.

(b) A child shall be deemed to be of the type described in subsection (a) hereof only upon certification pursuant to rules and regulations of the [state education agency] that he is suffering from physical or mental illness or disease of such severity as to make his presence in a school facility or his travel to and from such facility impossible or dangerous to his health or the health of others. For such children, home, hospital, institutional or other regularly scheduled and suitable instruction meeting standards of the [state education agency] shall be provided by the public schools.

TITLE ____
EDUCATION OF THE HANDICAPPED

PART I. POLICY

Section 100.

Provision and Implementation

It is the policy of this state to provide, and to require school districts to provide, as an integral part of free public education, special education sufficient to meet the needs and maximize the capabilities of handicapped children. The timely implementation of this policy to the end that all handicapped children actually receive the special education necessary to their proper development is declared to be an integral part of the policy of this state. This section applies to all handicapped children regardless of the schools, institutions, or programs by which such children are served.

Section 101.

Services Mandatory

The [state education agency] shall provide or cause to be provided by school districts all regular and special education, corrective, and supporting services required by handicapped children to the end that they shall receive the benefits of a free public education appropriate to their needs. It shall be within the jurisdiction of the [state education agency] to organize and to supervise schools and classes according to the regulations and standards established for the conduct of schools and classes of the public school system in the state in all institutions wholly or partly supported by the state which are not supervised by public school authorities. Schools and classes so established in wholly state owned institutions shall be financed by the [state education agency].

Section 102.

Preference for Regular Programs

To the maximum extent practicable, handicapped children shall be educated along with children who do not have handicaps and shall attend regular classes. Impediments to learning and to the normal functioning of handicapped children in the regular school environment shall be overcome by the provision of special aids and services rather than by separate schooling for the handicapped. Special classes, separate schooling or other removal of handicapped children from the regular educational environment, shall occur only when, and to the extent that the nature or severity of the handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily.

Section 103.

Facilities

Physical aspects and specifications of schools, classrooms and other facilities for, or likely to be used by handicapped children, shall be related to their special physical, educational and psychological needs. To this end, school districts, [Special Education Services Associations], agencies of the state and its subdivisions, and any private persons or entities constructing, renovating or repairing facilities with or aided by public funds, which facilities are expressly intended for or are likely to be used by handicapped children, shall plan, locate, design, construct, equip, and maintain them with due regard for the special capabilities, handicaps and requirements of the handicapped children to be accommodated therein.

Section 104.

Responsibilities

It is the responsibility of local governments and school districts to expend effort on behalf of the education of each handicapped child equal to the effort expended on account of the education of each child who does not have a handicap. Any additional effort necessary to provide supplemental aids and services shall be the ultimate responsibility of the state but shall, to the maximum extent practicable, be administered through the local school districts.

Section 105.

Private Programs

The responsibility of local governments, school districts, and the state, to provide a free public education for handicapped children is not diminished by the availability of private schools and services. Whenever such schools and services are utilized, it continues to be the public responsibility to assure an appropriate quantity and quality of instructional and related services, and the protection of all other rights, and to ascertain that all handicapped children receive the educational and related services and rights to which the laws of this state entitle them.

PART II. DEFINITIONS

Section 200.

Definitions

As used in this Title:

(a) "Handicapped child" means a natural person between birth and the age of twenty-one, who because of mental, physical, emotional or learning problems requires special education services.

(b) "Special education" means classroom, home, hospital, institutional or other instruction to meet the needs of handicapped children, transportation and corrective and supporting services required to assist handicapped children in taking advantage of, or responding to, educational programs and opportunities.

(c) "School district" means either a school district or a political subdivision operating a public school or public school system.

(d) "Special education facility" means a school or any portion thereof, remedial or supplemental facility or any other building or structure or part thereof intended for use in meeting the educational, corrective, and related needs of handicapped children.

PART III. STATE AND LOCAL RESPONSIBILITIES

Section 300.

Establishment of Division

There is hereby established in the [State Education Agency] a Division for the Education of the Handicapped. The Division shall be headed by a Director who shall be qualified by education, training, and experience to take responsibility for, and give direction to, the programs of the [State Education Agency] relating to the handicapped.

Section 301.

Advisory Council

(a) There shall be an Advisory Council for the Education of the Handicapped which shall advise and consult with the [head of the state education agency] and the Director of the Division for the Education of the Handicapped, and which shall engage in such other activities as are hereinafter set forth. The Advisory Council shall be composed of [9] members who are not officers or employees of State agencies and no more than [4] of whom may be officers or employees of local school districts. The [head of the state education agency] shall appoint the members of the Advisory Council for [3] year terms, except that of those first appointed, [3] shall be appointed for terms of one year, [3] for terms of two years and [3] for terms of three years. Vacancies shall be filled for the unexpired term in the same manner as original appointments.

(b) The Advisory Council shall be composed of persons broadly representative of community organizations interested in the handicapped, professions related to the educational needs of the handicapped, and the general public.

(c) The Advisory Council annually shall elect its own chairman and vice chairman. The director of the Division for the Education of the Handicapped shall meet with and act as secretary to the Advisory Council and, within available personnel and appropriations, shall furnish meeting facilities and staff services for the Advisory Council. The [state education agency] shall regularly submit, as part of its budget requests, an item or items sufficient to cover expenses of the operation of the Advisory Council and of its members in connection with their attendance at meetings of the Advisory Council, and other Advisory Council activities.

(d) The Council shall:

1. Have an opportunity to comment on rules and regulations proposed for issuance pursuant to this Title.

2. Consider any problems presented to it by the [head of the state education agency] or the Director of the Division for the Education of the Handicapped, and give advice thereon.

3. Review the State Plan prepared pursuant to Section 400 of this Title prior to its submission to the governor and legislature and comment thereon to the [head of the state education agency] and the Director of the Division for the Education of the Handicapped.

4. Make an annual report to the governor and legislature, and [the state board of education] which report shall be available to the general public and shall present its views of the progress or lack thereof made in special education by the state, its agencies and institutions, and its school districts during the preceding year.

(e) Funds for the publication of the report referred to in subsection (d) of this Section shall be made available from the regular appropriations to the [state education agency].

Section 302.

Special Education Services Association

A school district may meet its obligations to provide educational, corrective, and supporting services for handicapped children, as set forth in this Title, and in any other laws and regulations of the [state education agency], by participating in a Special Education Services Association established and operated pursuant to this Title.

A Special Education Services Association may be the means whereby participating school districts perform all of their special education functions or perform only specified special education functions. In the latter case, participating school districts shall continue to provide special education and related services not provided by such an Association on an individual district basis or in some other manner pursuant to law.

Section 303.

Area and Manner of Establishment

A Special Education Services Association shall provide services for all the area included within the school districts participating in it. It may be established by [resolution of each of the governing boards of the school districts participating in it] [by vote of the electors in each of the participating school districts in the same manner as a school bond referendum].

Section 304.

Governing Board

The Governing Board of a Special Education Services Association shall consist of representatives of the participating school districts. Unless otherwise provided in a written agreement embodied in the resolutions or propositions by which the Special Education Services Association is established, each participating school district shall have one representative. The representatives of each school district on the Governing Board shall be [elected by the governing board of the school district from its own members] [elected by the voters of the school district]. Each such representative shall have one vote on the Governing Board.

Section 305.

Powers of Governing Board

The affairs of a Special Education Services Association shall be administered by its Governing Board, and the officers and employees thereof. A Special Education Services Association shall have power to:

(a) Establish and operate programs and classes for the education of handicapped children.

(b) Acquire, construct, maintain and operate facilities in which to provide education, corrective services, and supporting services for handicapped children.

(c) Make arrangements with school districts participating in the Special Education Services Association for the provision of special education, corrective, and supporting services, to the handicapped children of such school districts.

(d) Employ special education teachers and personnel required to furnish corrective or supporting services to handicapped children.

(e) Acquire, hold and convey real and personal property.

(f) Provide transportation for handicapped children in connection with any of its programs, classes or services.

(g) Receive, administer and expend funds appropriated for its use.

(h) Receive, administer and expend the proceeds of any issue of school bonds or other bonds intended wholly or partly for its benefit.

(i) Apply for, accept, and utilize grants, gifts, or other assistance, and, if not contrary to law, comply with the conditions, if any, attached thereto.

(j) Participate in, and make its employees eligible to participate in, any retirement system, group insurance system, or other program of employee benefits, on the same terms as govern school districts and their employees.

(k) Do such other things as are necessary and incidental to the execution of any of the foregoing powers, and of any other powers conferred upon Special Education Services Associations elsewhere in this Title or in other laws of this state.

Section 306.

Special Education Centers

(a) A Special Education Services Association may establish and operate one or more special education centers to provide diagnostic, therapeutic, corrective, and other services, on a more comprehensive, expert, economic and efficient basis than can reasonably be provided by a single school district. Such services may be provided in the regular schools by personnel and equipment of a center or, whenever it is impractical or inefficient to provide them on the premises of a regular school, the center may provide services in its own facilities. To the maximum extent feasible, such centers shall be established at, in conjunction with, or in close proximity to one or more elementary and secondary schools.

(b) Centers established pursuant to this Section also may contain classrooms and other educational facilities and equipment to supplement instruction and other services furnished to handicapped children in the regular schools, and to provide separate instruction to children whose degree or kind of handicap makes it impracticable or inappropriate for them to participate in classes with normal children.

(c) Centers established pursuant to this Section may include dormitory and related facilities and services in order to permit handicapped children who may not reasonably go to and from home daily to receive educational and related services.

(d) No facilities may be acquired or constructed pursuant to this Section unless application therefor has been made by the Special Education Services Association to the Division of Education for the Handicapped and a permit for such facilities has been issued by the Division. The permit may contain such conditions as the Division may deem appropriate to assure conformity with the policy of this Title. No permit shall be issued unless the Division of Education for the Handicapped is satisfied that every effort has been and is being made to accommodate the educational or related services in regular school buildings or on regular school premises, and, that separate facilities are necessary.

Section 307.

Relation to School Districts

(a) A Special Education Services Association shall provide educational, corrective, and supporting services for all handicapped children who are residents thereof, except for special education, corrective, and supporting services that are provided directly by the state, and any special educational, corrective, and supportive services as, pursuant to the agreement under which the Association functions, are expressly reserved for continued provision by the individual school districts. To the maximum extent practicable, a Special Education Services Association shall make such provision in the regular schools of the school districts served by the Special Education Services Association or in its own facilities established and operated pursuant to

Section 305 of this Title. A Special Education Services Association shall make arrangements with, and payments to, private schools, institutions, and agencies, for services to handicapped children only if it is unable to provide satisfactory service with its own facilities and personnel, and the facilities and personnel of its member school districts.

(b) A Special Education Services Association shall provide home or hospital instruction, corrective, and supporting services to handicapped children, but only in cases where the nature and severity of the handicap make the provision thereof in the regular schools, or in other facilities of the Special Education Services Association, the state, or in suitable private facilities, impracticable.

(c) A school district may qualify, for the purposes of state aid, as a Special Education Services Association, if it provides a full complement of educational, corrective, and supporting services, exclusive of services provided directly by the state, for all handicapped children resident within its boundaries. Upon application made pursuant to Section 308 (c) of this Title the [state education agency] shall determine whether the applicant school district meets the requirements of the subsection.

Section 308.

Application for Special Education Services Association Status

(a) Any Special Education Services Association which is in the process of formation, and which proposes to qualify for state aid, shall submit the interschool district agreement pursuant to which it proposes to function to the [state education agency]. Such submission may be either prior or subsequent to adoption of the agreement and the resolution or proposition required by Section 302 of this Title but no Special Education Services Association shall receive state aid unless it has been approved therefor by the [state education agency].

(b) The [state education agency] shall approve a Special Education Services Association for state aid if it determines that:

1. The Association complies with all provisions of this Title, or if the Association is not yet in operation, that it will have the resources and authority to comply therewith.

2. The geographic area served or to be served by the Special Education Services Association is not so located or of such a configuration as to exclude one or more other school districts from effective participation in a Special Education Services Association or from forming a viable Association of their own.

(c) A school district may apply for and receive the status of a Special Education Services Association by submitting to the [state education agency] an appropriate resolution of its governing board requesting such status. The provisions of Section 309 hereof shall not apply to an application submitted pursuant to this subsection, but the application shall not be approved unless the [state education agency] finds that the school district complies with subsection (b) 1 of this Section, and that it maintains a full complement of special education facilities and programs.

Section 309.

Interschool District Agreement

(a) Each Special Education Services Association, other than one composed of a single school district, shall function pursuant to and in accordance with an interschool district Agreement (hereinafter referred to as "the Agreement"). The Agreement may be incorporated in the resolution or other action establishing the Special Education Services Association or may be a separate document. In any case, however, it shall be adopted either by affirmative vote of each of the governing boards of the school districts participating in the Special Education Services Association or by affirmative vote of the electors in each such school district.

(b) An Agreement shall contain:

1. A precise identification of the party school districts.

2. An enumeration or other precise delineation of the services to be provided by the Special Education Services Association.

3. Provisions relating to the internal management and control of the Special Education Services Association.

4. Provisions defining the relationships between the party school districts and the Special Education Services Association in regard to the responsibilities for regular education of handicapped children and special education, corrective, and supporting services for handicapped children.

5. Provisions fixing the financial responsibilities of each party school district to the Special Education Services Association or setting forth formulas, procedures and other

specific methods for the calculation thereof.

6. A minimum duration for the Agreement.

7. Provisions for amendment, renewal, withdrawal from or termination of the Agreement.

8. Provisions for the disposition of Special Education Services Association property upon dissolution of the Association.

9. Financial settlement, if any, with a withdrawing school district.

10. Any other necessary or appropriate provisions.

(c) Prior to becoming effective, an Agreement shall be submitted to the [state education agency] and the Attorney General, and it shall not go into effect unless approved thereby. Failure to respond to a submission within [90] days shall constitute approval thereof.

(d) 1. The [state education agency] shall approve a submitted Agreement, unless it finds that the provisions thereof do not accord with this Title and the policies set forth herein, or unless it finds that the Agreement does not contain sufficient evidence that the Special Education Services Association will have the means of providing the facilities, personnel and services necessary to fulfill its obligations toward handicapped children.

2. The Attorney General shall approve a submitted Agreement, unless he finds it to be in improper form, or unless he finds one or more of its provisions contrary to law.

Section 310.

Contracts Not Prohibited

Nothing in this part shall be construed to prevent a school district from providing educational, corrective, or supporting services for handicapped children by contracting with another school district to provide such services for handicapped children from such other district.

Section 311.

Withdrawal and Dissolution

(a) A school district which is included in a Special Education Service Association may withdraw from participation in any part of the Association only with the approval of the Director of the Division for the Education of the Handicapped after he has conferred with the district and is satisfied that such withdrawal is in the interest of the handicapped children in the Association and the school district affected. Such withdrawal shall be effective only if the school board has the approval of the Director of the Division of the Education of the Handicapped to establish a comparable part of a program. Such withdrawal shall not be effective until the end of the next full school year. The withdrawing school district shall be liable for its proportionate share of all operating costs until its withdrawal becomes effective, shall continue to be liable for its share of debt incurred while it was a participant and shall receive no share in the assets.

(b) An Association established under this part may be dissolved by action of its governing board, but such dissolution shall not take place until the end of the school year in which the action was taken. When an Association is dissolved, assets and liabilities shall be distributed to all entities which participated in the Association.

PART IV. PLANNING

Section 400.

State Plan

(a) The [state education agency], acting through its Division for the Education of the Handicapped, shall make and keep current a plan for the implementation of the policy set forth in Part I of this Title. The plan shall include:

1. A census of the handicapped children in the state showing the total number of such children and the geographic distribution of handicapped children as a whole.

2. Provision for diagnosis and screening of handicapped children.

3. An inventory of the personnel and facilities available to provide instruction and other services for handicapped children.

4. An analysis of the present distribution of responsibility for special education between the state and local school systems and general units of local government, together with recommendations for any necessary or desirable changes in the distribution of responsibilities.

5. Identification of the criteria for determining how handicapped children are to be educated.

6. Standards for the education to be received by each of the several categories of handicapped children in regular schools or

school districts and in state institutions, including methods of assuring that education afforded the handicapped will be as nearly equivalent as may be to that afforded regular children and also will take account of their special needs.

7. A program for the preparation, recruitment and inservice training of personnel in special education and allied fields, including participation, as appropriate, by institutions of higher learning, state and local agencies, and any other public and private entities having relevant expertise.

8. A program for the development, acquisition, construction and maintenance of facilities, and new, enlarged, redesigned and replacement facilities needed to implement the policy of this Title.

9. A full description of the state plan for providing special education to all handicapped children in this state, including each of the matters enumerated herein, and any other necessary or appropriate matters.

10. Any additional matters which may be necessary or appropriate, including recommendations for amendment of laws, changes in administrative practices and patterns of organization, and changes in levels and patterns of financial support.

(b) The plan required by subsection (a) hereof shall be presented to the Governor and the Legislature and made available for public distribution no later than [ ]. Thereafter, amendments to or revisions of the plan shall be submitted to the Governor and Legislature and made available for public distribution no less than [90] days prior to the convening of each regular session of the Legislature. All such submissions, except for the initial submission of the plan, shall detail progress made in fulfilling the plan and in implementing the policy of this Act.

Section 401.

Local Planning and Responsibility

(a) On or before [ ], each school district shall report to the [state education agency] the extent to which it is then providing the special education for handicapped children necessary to implement fully the policy of this title. The report shall also detail the means by which the school district or political subdivision proposes to secure full compliance with the policy of this Title, including:

1. A precise statement of the extent to which the necessary education and services will be provided directly by the district pursuant to law requiring such direct provision.

2. A precise statement of the extent to which standards in force pursuant to Section 400(a)6 of this Title are being met.

3. An identification and description of the means which the school district or political subdivision will employ to provide, at levels meeting standards in force pursuant to Section 400(b) of this Title, all special education not to be provided directly by the state.

(b) After submission of the report required by subsection (a) hereof, the school district shall submit such supplemental and additional reports as the [state education agency] may require, in order to keep the plan current. By rule or regulation, the [state education agency] shall prescribe the due dates, form and all other necessary or appropriate matters relating to such reports.

(c) For the purposes of this Section, handicapped children being furnished special education in state schools or other state facilities shall continue to be the planning responsibility of the school district in which they would be entitled to attend school if it were not for the direct provision of special education to them by the state. A record of each such child, the nature and degree of his handicap and of the way in which his educational needs are being met shall be kept by the school district.

Section 402.

Interstate Cooperation

Any state and local plans made pursuant to this Part shall take into account the advantages and disadvantages in providing special education to particular kinds of handicapped children through cooperative undertakings with other jurisdictions.

(a) In addition to any arrangements that may be made pursuant to Sections 302–305 of this Title, the state or school district may enter into agreements with other school districts or states to provide such special education: provided that a child receiving special education outside the school district in which he would normally attend public school shall continue to be the responsibility of such school district and nothing herein shall be deemed to relieve the school district from compliance with the requirements of this Title.

(b) Agreements made pursuant to this Section may include the furnishing of educational and related services, payment of reasonable costs thereof, the making of capital contributions toward the construction or renovation of joint or common facilities or facilities regularly made available by one party jurisdiction to the handicapped children of another party jurisdiction, and furnishing of or responsibility for transportation, lodging, food and related living costs.

(c) Any child given educational or related services and any parent or guardian of such child, pursuant to this Section and any agreement made pursuant hereto, shall continue to have all civil and other rights that he would have if receiving like education or related services within the subdivision or school district where he would normally attend public school. No agreement made on the authority of this Section shall be valid unless it contains a provision to such effect.

PART V. IDENTIFICATION OF HANDICAPPED CHILDREN

Section 500.

Children Attending School

Every school district shall test and examine, or cause to be tested and examined, each child attending the public and private schools within its boundaries in order to determine whether such child is handicapped. The tests and examinations shall be administered on a regular basis in accordance with rules and regulations of the [State Education Agency]. As used in this Part, the term "schools" shall mean kindergartens and grades 1–12 and, if the school district provides educational programs below kindergarten level or above grade 12 to all children attending such programs.

Section 501.

Limitation

The requirements of Section 500 shall not apply to children attending private schools, if the children are not residents of this state provided that if the state or the school district had an agreement with another state or school district requiring such tests and examinations, the school district shall administer them and report the results to the school district of the child's residence.

Section 502.

Records

Every school district shall make and keep current a list of all handicapped children required to be tested and examined pursuant to Sections 500 and 501 of this Title who are found to be handicapped and of all children who are residents of the school district and are receiving home, hospital, institutional or other special education services in other than regular programs.

PART VI. PROVISION OF SPECIAL EDUCATION MATERIALS AND TRAINING

Section 600.

[Unit] Established

There shall be in the Division for the Education of the Handicapped a "Special Education Materials and Training Unit," hereinafter called ["the Unit"], for the purpose of assisting in the education of handicapped persons.

Section 601.

Functions

In addition to any functions in which it may engage pursuant to other provisions of this Title or other laws, the [Unit] may:

(a) Develop, test, demonstrate, maintain, purchase or otherwise acquire, store, produce if not reasonably obtainable from commercial sources, and make available equipment, materials, and special supplies and devices particularly useful in connection with the education of handicapped persons.

(b) Study, develop, and disseminate information concerning techniques for teaching handicapped persons.

(c) Collect, evaluate, and disseminate research data and other information related to special equipment, materials, supplies, devices, techniques and training.

(d) Provide instruction in the operation or use of equipment, materials, supplies, and devices of the type referred to in (a) of this section.

(e) Provide in-service training for teachers of handicapped persons and other persons requiring special skills or understanding in connection with the education of handicapped persons.

(f) Accept, administer, and utilize federal aid and any other grants, gifts, or donations of funds, equipment, materials, supplies, facilities, and services in connection with any of its authorized functions, and comply with any requirements or conditions attached thereto: provided that the same are not inconsistent with law.

Section 602.

Availability of Programs

(a) The [Unit] shall furnish, lend, or otherwise make available its equipment, materials, supplies, and devices to public school systems, private nonprofit schools, special schools or institutions for handicapped children, and public and private nonprofit institutions of higher learning.

(b) Public and private nonprofit institutions and organizations operating programs of vocational rehabilitation [recognized or approved] pursuant to [cite appropriate statute] also shall be eligible in the same manner as institutions qualifying under subsection (a) hereof.

(c) Pre-school public and private nonprofit programs for the education of handicapped children also shall be eligible in the same manner as institutions qualifying under subsection (a) hereof, if approved by the [Unit].

(d) Handicapped persons may apply for and receive equipment, materials, supplies and devices on an individual basis if the [Unit] has established loan or other services for making the same available to users not covered by subsections (a)–(c) hereof and has provided appropriate procedures therefor.

(e) The [Unit] shall make equipment, materials, supplies, or devices available pursuant to subsections (a)–(c) hereof only on written application made in such form and manner as it may prescribe. The application shall be approved, and the equipment, materials, supplies, or devices furnished only if the [Unit] is satisfied that the applicant has a need therefor and is capable of putting them to appropriate use. Applications shall contain information concerning the number of handicapped children for whom the applicant is providing instruction or, in the case of a new institution or program, the number expected to be so served; the type or types of handicap; and such other information as the [Unit] may require.

Section 603.

Regional Service

(a) Except as may be provided pursuant to this section, the [Unit] shall provide equipment, materials, supplies, devices and in-service training only to schools and school systems, institutions, organizations, and persons in this state.

(b) In view of the specialized character of the functions of the [Unit], it is recognized that its support and utilization on a multistate or regional basis may promote efficiency and economy, and may make it possible for more persons in need of special education to receive it. Accordingly, it is the policy of this state to encourage multistate and regional cooperation to that end.

(c) The [State Department of Education] may enter into contracts with other states or their appropriate educational agencies for the furnishing of services, equipment, materials, supplies, or devices by the [Unit]. Such contracts may provide for the carrying on of any one or more functions which the [Unit] is authorized to perform in such manner as to serve schools and school systems, institutions, organizations, and persons in such other state or states: provided that unless the activities covered by the contract are financed entirely by the other state or states, including the maintenance of a separate staff or the pro rata contribution to the salaries and other compensation of staff partly employed for the benefit of one or more other states and this state, no school or school system, institution, organization, or person may be furnished with equipment, materials, supplies, devices, or training who would be ineligible to receive the same under the laws of this state.

(d) Contracts made pursuant to this Section shall provide for:

1. their duration;
2. appropriate consideration and the payment thereof;
3. the nature and extent of the equipment, materials, supplies, devices, and training to be furnished and received;
4. the performance of inspections and examinations and the making of reports; the evaluation thereof; and the granting or denial of benefits on the basis thereof;
5. any other necessary and appropriate matters.

(e) Consideration provided by any contract made with the [State Department of Education] pursuant to this Section shall be at least sufficient to cover the cost of any equipment, materials, supplies, or devices furnished, and an equitable share of the operating costs in connection with any in-service training given to persons from other states. It shall be a guiding principle for the making of contracts pursuant to this Section that if the use made or to be made of the [Unit] by another state is in excess of [10] per cent of the use made by this state and schools and school systems, institutions, organizations, or persons in this state, consideration required from such other state shall include an equitable contribution to overhead and capital costs, as well as to operating costs and costs of equipment, materials, supplies, and devices furnished.

Section 604.

Contracting Authority

The [State Education Agency] is authorized to enter into contracts for the furnishing of equipment, materials, supplies, devices, and personnel training that are peculiarly useful in the teaching of handicapped children. The [State Education Agency] may pay such consideration, out of funds available therefor, as may be appropriate and equitable in the circumstances. If another state, public agency, or private nonprofit agency establishes and maintains a substantial, specialized program for the development, production, procurement, and distribution of special equipment, materials, supplies, and devices, or for the training of personnel useful in the teaching of handicapped children, and if the contract or contracts entered into pursuant to this Section assure this state of substantial benefits therefrom on a continuing basis, consideration paid by the [State Education Agency] may be calculated to include overhead and capital costs as well as more immediate operational costs and the costs of any articles or services furnished or to be furnished.

Section 605.

Availability of Articles and Services

Any articles or services secured by or through the [State Education Agency] pursuant to contracts made under the authority of this Title may be made available to any school systems, special schools, or other persons and entities entitled to participate in or receive benefits from special services to the handicapped. The ultimate apportionment and bearing of costs as among the state, subdivisions thereof and other persons and entities shall be in accordance with law.

Section 606.

Inspections, Reports, and Records

(a) The [Unit] may inspect the facilities of any applicant for or recipient of its equipment, materials, supplies, and devices, and may examine any pertinent records in order to determine facts relevant to the administration of this Title. For this purpose, the [Unit] and its duly authorized representatives shall have access to the premises and any pertinent records of the applicant or recipient at all reasonable times.

(b) The [Unit] may require reasonable reports from any recipient institution or program detailing the uses made of equipment, materials, supplies, and devices made available pursuant to this Title, and of the workability or beneficial effects obtained therefrom.

(c) The [Head of the State Education Agency] may provide for the consolidation of inspections, examinations of records, and making of reports pursuant to this Section with other inspections, examinations, and reports made or required to be made by the [State Education Agency] or may permit them to be separate, as in his judgment is most appropriate to the proper administration of this Title and the promotion of general efficiency.

Section 607.

Relationship of the Unit to Other Entities

(a) Unless the function is performed for it by a Special Education Services Association each school district and state institution shall establish and maintain a special education resources center which shall perform the functions of procurement, maintenance, servicing and distribution of special education equipment, supplies and materials to the schools of the district and to any other persons or entities to which they are made available pursuant to law. Special education equipment, supplies, and materials made available to schools and other entities shall be provided, made available and inventoried by such center.

(b) To the extent of its capabilities, a special education resources center may establish and operate or cooperate with others in establishing and operating programs of in-service training similar to those authorized for the state unit by Part VIII of this Title.

(c) Centers established as required by this Section shall cooperate with and may borrow or otherwise obtain from the state unit, regional instructional materials centers, federal and other governmental agencies, and appropriate private agencies such equipment, supplies and materials as may be available therefrom and may be responsible for their proper distribution to and collection from schools and other entities entitled to receive and utilize them.

(d) It is the purpose of this Section to promote the efficient and expert use of special education aids and to discourage their being positioned, kept or made available for use by persons and under conditions not conducive to their proper employment. The Division for the Education of the Handicapped shall develop, revise and keep in force regulations and guidelines for the operation of centers and for their relationships to schools or other proper recipient entities. The state Unit shall assist centers in their programs of training, equipment servicing, distribution and general administration.

(e) The state Unit shall encourage the maintenance of centers by Special Education Services Associations on behalf of their participating school districts, except in those instances where an individual school district has qualified as a Special Education Services Association.

PART VII. REMEDIES

Section 700.

Administrative and Judicial Review

(a) A child, or his parent or guardian, may obtain review of an action or omission by state or local authorities on the ground that the child has been or is about to be:

1. denied entry or continuance in a program of special education appropriate to his condition and needs.
2. placed in a special education program which is inappropriate to his condition and needs.
3. denied educational services because no suitable program of education or related services is maintained.
4. provided with special education or other education which is insufficient in quantity to satisfy the requirements of law.
5. provided with special education or other education to which he is entitled only by units of government or in situations which are not those having the primary responsibility for providing the services in question.
6. assigned to a program of special education when he is not handicapped.

(b) The parent or guardian of a child placed or denied placement in a program of special education shall be notified promptly, by registered certified mail return receipt requested, of such placement, denial or impending placement or denial. Such notice shall contain a statement informing the parent or guardian that he is entitled to review of the determination and of the procedure for obtaining such review.

(c) The notice shall contain the information that a hearing may be had, upon written request, no less than [15] days nor more than [30] days from the date on which the notice was received.

(d) No change in the program assignment or status of a handicapped child shall be made within the period afforded the parent or guardian to request a hearing, which period shall not be less than [14] days, except that such change may be made with the written consent of the parent or guardian. If the health or safety of the child or of other persons would be endangered by delaying the change in assignment, the change may be sooner made, but without prejudice to any rights that the child and his parent or guardian may have pursuant to this Section or otherwise pursuant to law.

(e) The parent or guardian shall have access to any reports, records, clinical evaluations or other materials upon which the determination to be reviewed was wholly or partially based or which could reasonably have a bearing on the correctness of the determination. At any hearing held pursuant to this Section, the child and his parent or guardian shall be entitled to examine and cross examine witnesses, to introduce evidence, to appear in person, and to be represented by counsel. A full record of the hearing shall be made and kept, including a transcript thereof if requested by the parent or guardian.

(f) A parent or guardian, if he believes the diagnosis or evaluation of his child as shown in the records made available to him pursuant to subsection (e) to be in error, may request an independent examination and evaluation of the child and shall have the right to secure the same and to have the report thereof presented as evidence in the proceeding. If the parent or guardian is financially unable to afford an independent examination or evaluation, it shall be provided at state expense.

(g) The [state education agency] shall make and, from time to time, may amend or revise rules and regulations for the conduct of hearings authorized by this Section and otherwise for the implementation of its purpose. Among other things, such rules and regulations shall require that the hearing officer or board be a person or composed of persons other than those who participated in the action or who are responsible for the omission being complained of; fix the qualifications of the hearing officer or officers; and provide that the hearing officer or board shall have authority to affirm, reverse or modify the action previously taken and to order the taking of appropriate action. The rules and regulations shall govern proceedings pursuant to this Section, whether held by the [state education agency] or by a [local education agency].

(h) The determination of a hearing officer or board shall be subject to judicial review [in the manner provided by the state administrative procedure act] [in the manner provided for judicial review of determinations] of the [state or local education agency] as the case may be. [If there is no applicable procedure, appropriate statutory provisions should be added here].

(i) If a determination or hearing officer or board is not fully complied with or implemented the aggrieved party may enforce it by a proceeding in the [ ] Court. Any action pursuant to this subsection shall not be a bar to any administrative or judicial proceeding by or at the instance of the [state education agency] to secure compliance or otherwise to secure proper administration of laws and regulations relating to the provision of regular or special education.

(j) The remedies provided by this Section are in addition to any other remedies which a child, his parent or guardian may otherwise have pursuant to law.

Section 701.

Enforcement Not Affected

Nothing in this Title shall be construed to limit any right which any child or his parent or guardian may have to enforce the provision of any regular or special educational service; nor shall the time at which school districts are required to submit plans or proceed with implementation of special education programs be taken as authorizing any delay in the provision of education or related services to which a child may otherwise be entitled.

Section 702.

Direct State Action

(a) If, at any time after [,] a school district is found by the [state education agency] to have failed to provide necessary education to all handicapped children who by law are entitled to receive the same from such school district, the [state education agency] may withhold all or such portion of the state aid for the regular public schools as, in its judgment, is warranted. The denial of state aid hereunder may continue until the failure to provide special education required is remedied. Whether or not the [state education agency] elects to withhold aid pursuant to the preceding sentence, it may provide the education directly.

(b) No action pursuant to subsection (a) hereof shall be taken by the [state education agency], except after public hearing on due notice, and on a record that establishes the failure of the school district to provide special education of adequate quantity and quality.

(c) If the [state education agency] acts to provide special education pursuant to this Section, such action may include:

1. The hiring, employment, and direction of special education teachers and any necessary supporting professional and other personnel.
2. The incorporation of such personnel into the affected school system.
3. The procuring and employment of such supplies, equipment and facilities as may be reasonably necessary or appropriate.
4. The furnishing of such administrative supervision and services as may be necessary to make the special education program effective.
5. The direct provision in state institutions or facilities of the special education, except that no child shall be removed from the school district in which he would regularly be entitled to receive special education, without the consent of such child's parent or guardian.
6. Any other incidental matters reasonably necessary to implement any one or more of the foregoing.

(d) Any costs incurred by the [state education agency] in administering subsections (a)–(c) of this Section shall be direct charges against the school district and shall be paid thereby. If a school district shall resist timely payment, the [state education agency] may make payment and reimburse itself by appropriate judicial proceedings against the school district.

(e) During any time when the [state education agency] is providing special education pursuant to this Section, it shall be a purpose of the [state education agency] to assist the school district to assume or reassume its full responsibilities for the provision of education for handicapped children. However, no state aid pursuant to Part X of this Title shall be given to a school district during or for any period when the provision of special education on its account is being administered directly by the [state education agency] pursuant to this Section. The [state education agency] shall return responsibility to the school district as soon as it finds that it is willing and able to fulfill its responsibilities pursuant to law.

PART VIII. TECHNICAL ASSISTANCE AND PERSONNEL TRAINING

Section 800.

Technical Assistance

The [state education agency], upon the request of any school district shall provide technical assistance in the formulation of any plan or subsequent report required pursuant to Section 401 of this Title. However, any such assistance shall be only advisory and consultative in character and shall not be designed to transfer either in whole or in part, the responsibility for or actual development of the plan or report.

Section 801.

In-Service Training

The in-service training programs of the Special Education Materials and Techniques Unit shall be available to any teacher of handicapped persons in the regular employ of any school system, institution, organization, or program which could be an eligible applicant for equipment, materials, supplies, or devices pursuant to Section 602 of this Title. However, the locations, times, duration, and specific educational or experience prerequisites for particular training programs or courses shall be determined by the [Unit].

Section 802.

Training

(a) The Division for the Education of the Handicapped may make traineeship or fellowship grants to persons who are interested in working in programs for the education of handicapped children, for either part-time or full-time study in programs designed to qualify them as special education personnel. Persons to qualify for a traineeship must have earned at least [sixty] semester hours of college credit and persons to qualify for a fellowship must be graduates of a recognized college or university. Such traineeships and fellowships may be in amounts of not more than [$] per academic year for traineeships and not more than [$] per academic year for fellowships with [$] per year per legal dependent except in addition, an additional sum up to [$] annually for each grantee may be allowed to any approved institution of higher learning in this state for the actual cost to the institution, as certified by the institution. Part-time students and summer session students may be awarded grants on a prorata basis.

(b) The Division for the Education of the Handicapped may contract with any approved institution of higher learning to offer courses required for the training of special education personnel at such times and locations as may best serve the needs of handicapped children in this state.

(c) The Division for the Education of the Handicapped shall administer traineeship and fellowship accounts and related records of each person who is attending an institution of higher learning under a traineeship or fellowship awarded pursuant to this Section.

(d) Following the completion of the program of study, the recipient of a traineeship or fellowship is expected to accept employment within one year in an approved program of education for handicapped children in this state on the basis of one-half year of service for each academic year of training received through a grant made under this Section. A person who fails to comply with this provision may, at the discretion of the Division for the Education of the Handicapped be required to refund all or part of traineeship or fellowship monies received.

Section 803.

Grants

The Division may provide grants to public and private agencies for such research, development, and model programs as are required to promote effective special education.

PART IX. FACILITIES

Section 900.

Regular School Facilities

(a) Every school district of this state constructing, renovating, remodeling, expanding or modifying school buildings or other structures intended as adjuncts thereto shall plan, design, construct and equip all such buildings and structures in such manner and with such materials as will facilitate use by all handicapped children who may reasonably be expected to enter upon the premises and to make use of them for instructional, remedial or supplementary services. This Section shall be interpreted and administered in the light of the policy of this state to educate and provide services for handicapped children in or in close proximity to the regular schools to the maximum practicable extent.

(b) No school or school-related construction, renovation, remodeling, expansion or modification shall be eligible for state aid pursuant to [cite appropriate statute] unless the [state education agency] finds that it is in conformity with subsection (a) hereof and [title of state law prohibiting architectural barriers for the handicapped].

Section 901.

Plans and Specifications

(a) Plans and specifications for every special education facility shall be prepared in two parts, as follows:

1. A statement of the educational and related objectives and functions to be served and the uses to be made of the facility.
2. Architectural plans and specifications.

(b) Plans as required by subsection (a) hereof shall be submitted to the [state education agency] for approval thereby. Such approval shall be a prerequisite to the awarding of any construction contract in connection with the facility, except for contracts for the development of the plans and specifications required to be submitted: nor shall any construction commence or permit therefor be issued prior to approval of the plans and specifications by the [state education agency].

(c) Approval shall be given only if the Division of Education for the Handicapped determines that the architectural plans and specifications properly implement the stated educational and related objectives and functions, and if the [state school construction agency] determines that the architectural plans and specifications provide for design, materials and equipment appropriate to serve the stated objectives and functions. If the submission is of plans and specifications for a building or other structure which does not include a special education facility, approval by the Division of Education for the Handicapped shall be limited to a certification that the submitting authority has other facilities adequate to meet the needs of handicapped children.

(d) No facility to which this Section applies shall be accepted by any agency of this state, or any school district, [Special Education Services Associations], or subdivision unless it conforms to the plans and specifications as approved, or as amended pursuant to subsection (e) hereof.

(e) Subsequent to approval of plans and specifications pursuant to this Section, they may be amended on a showing that the stated educational and related objectives and functions have been replaced by other suitable objectives and functions and that the architectural plans and specifications have been modified to conform to the new objectives and functions, or that the proposed amendment of architectural plans and specifications will not impair the suitability of the facility for the previously stated objectives and functions. Amendments shall be submitted and approved in the same manner as original submissions.

(f) Any entity which may be eligible for state aid pursuant to [cite statute providing state aid to construction of special education facilities], may qualify therefor only on submission and approval of plans and specifications in accordance with this Part.

Section 902.

Rules, Regulations and Manual

(a) The [state education agency] shall issue, and from time to time amend and revise, rules and regulations for the implementation of this Part. Such rules and regulations shall include procedures for submission and review of plans and specifications and may include requirements for additional information to be furnished by school districts, Special Education Services Associations, or entities constructing or proposing to construct special education facilities.

(b) The [state education agency] shall develop and publish a manual containing educational, and architectural standards to be met by special education facilities. The manual shall be incorporated in the rules and regulations issued pursuant to this Part and no approval or acceptance of a facility shall be lawful, except on compliance with the standards contained therein.

(c) The manual shall be developed, amended, and revised with due regard for standards applicable to the construction of special education facilities issued by recognized professional organizations.

(d) Public and private builders and operators of special education facilities may consult with the [state education agency] concerning any matter related to the administration of this Part or any special education facility proposed to be constructed or operated by them, but no such consultation and no representation made shall be construed as an approval of plans and specifications. Such approval may be given only pursuant to Section 901 of this Act.

PART X. FINANCE

Section 1000.

State Aid to be Provided

The state shall provide financial aid in each school year to school districts and other [public entities] [entities entitled by the laws of this state to receive school aid] for educational and related services provided by them for handicapped children. Such aid shall be determined and paid in accordance with this Part and rules and regulations of the [state education agency].

Section 1001.

Elements to be Aided

State financial aid pursuant to this Title may be claimed by and shall be paid to any public school district or other [public entity] [entities entitled by the laws of this state to receive school aid] for each of the following elements:

(a) The education of handicapped children in the regular school programs of the district or entity.

(b) The education of handicapped children in special classes, schools and programs designed to meet their special needs; and the furnishing of corrective or remedial services designed to ameliorate or eliminate physical, mental, emotional, or learning disabilities or handicaps.

(c) The furnishing of transportation.

Section 1002.

Amounts of Aid

(a) For purposes of entitlement to state aid, handicapped children shall be counted in the same manner as other children. [Per pupil aid shall be determined on the same basis as for normal children pursuant to [cite appropriate section of state law].] [Units shall be allotted for handicapped children in accordance with [cite appropriate provision of Minimum Foundation Program Laws], except that allowance of any lesser number of pupils to comprise a standard or minimum unit shall continue as provided in [cite appropriate section of state law].]

(b) In addition to the state aid claimed and paid pursuant to subsection (a) hereof, any school district or Special Education Services Association which has maintained an approved program of education for handicapped children during any school year shall be entitled to and receive reimbursement from the state for the excess cost of the individuals in said program above the cost of pupils in the regular curriculum which shall be determined in the following manner:

1. Each district shall keep an accurate, detailed, and separate account of all monies paid out by it for the maintenance of each of the types of classes and schools for the instruction and care of pupils attending them and for the cost of their transportation, and shall annually report thereon, indicating the excess cost for elementary or high school pupils for the school year ending [ ] over the last ascertained average cost for the instruction of regular children in the elementary public schools or public high schools as the case might be, of the school district for a like period of time of attendance.

2. Each Special Education Services Association shall keep an accurate, detailed, and separate account of all monies paid out by it for the maintenance of each of the types of classes and schools for the instruction and care of pupils attending them and for the cost of their transportation, and shall annually report thereon, indicating the excess cost for elementary or high school pupils for the school year ending in [ ] over the last ascertained average cost for the instruction of regular children in the elementary public schools or public high schools as the case might be, of the school districts served by the Special Education Services Association for a like period of attendance.

(c) In addition to any state aid for the transportation of children to and from school and other transportation in connection with school-related activities, the [state education agency], upon a claim properly substantiated, shall pay 100 percent of the costs of special buses and other special equipment actually employed in transporting handicapped children.

Section 1003.

Apportionment of Aid

If any of the educational or other services aided pursuant to this Part are provided partly by one school district or other entitled entity and partly by another such district or entity, and if there is no valid contract or agreement by which one of the districts or entities is the proper claimant for all the aid in question, each such district and entity shall be entitled to claim and receive a proportionate share of State aid in accordance with its actual assumption of costs. The [state education agency] shall provide for the calculation and apportionment of state aid in cases covered by this subsection.

Section 1004.

Special Fund

(a) There is hereby established a Special Education Fund in the state treasury. Each budget of the [state education agency] shall contain an appropriation item for the Fund. It is the legislative intent that the Fund shall be kept at a level that will permit an annual rate of expenditure therefrom of not less than [$].

(b) The [state education agency] shall make grants from the Fund to school districts, special education services associations, and other appropriate entities. The purposes of such grants shall be to make it possible for the recipients to:

1. Secure technical assistance with planning, design, acquisition, and construction of facilities or equipment for the education of handicapped children.

2. Supplement otherwise available but inadequate funds for planning, design, acquisition, or construction of facilities or equipment for the education of handicapped children.

(c) In applying for grants under this Section, a school district, special education services association, or other appropriate entities shall demonstrate that it proposes to use the aid for a purpose identified in the state plan made pursuant to Section [ ] of this title as requiring particular current attention or for a purpose selected by the division of education for the handicapped as one currently to receive concentrated efforts at improvement.

(d) Grants pursuant to this Section shall be in addition to regular or special aid otherwise available from the state for educational purposes.

Section 1005.

Federal Aid

The [state education agency] may apply for, administer, receive, and expend any federal aid for which this state may be eligible in the administration of this Title. If such aid is available for a multistate or regional program in which this state participates pursuant to one or more contracts in force pursuant to this Title, the [state education agency] may apply for and devote all or a portion of the federal aid to the multistate or regional program.

This chapter is reprinted with minor editorial changes from State Law & Education of Handicapped Children: Issues and Recommendations *by F.J. Weintraub, A.R. Abeson, and D.L. Braddock, The Council for Exceptional Children, Reston, Virginia, 1971.*

Section III:

Avenues for Public Policy Change

Section Editor

Alan Abeson

Overview

☐ Prior to 1971, the most widely recognized route to achieve change in public policy for the education of exceptional children was through the passage of law at the federal and state levels. The earliest references to public policy in the official journal of The Council for Exceptional Children, *Exceptional Children*, appeared in the second and third volumes in 1936 and 1937, and focused on federal law (Lenroot, 1936; Berry, 1937). The first major references to state law appeared in journal issues of 1941 and 1942. In an article describing the relationship between special education and the theme of American Education week of 1941, Martens (1941) reported that "another evidence of special education's contribution to a strong America lies in the increasing interest of state authorities in sponsoring a legislative program in behalf of adequate educational provisions for the handicapped." In 1942, another article reported the convening on June 15 of that year of the governor's conference on exceptional children in Chicago which had as one of its purposes the examination of "some legislative proposals that might help to solve the problems of the exceptional children of the state".

Further examination of the contents of *Exceptional Children* reveals that during the intervening years increasing attention was devoted to the relationship between government and special education. Although between 1936 and 1942, the first six volumes of *Exceptional Children* contained four articles relating to public policy, the six most recent volumes (1969 to 1975) have contained 32 articles dealing with this subject. Of significance as well is the fact that the content of many of these recent articles reflects the field's growing awareness that the public policy impacting on the education of exceptional children is not solely based in legislative action. The publication of the Ross, DeYoung and Cohen article in 1971 regarding the involvement of the Nation's courts in policymaking for the education of handicapped children, brought to the attention of the field the judicial route for achieving change. The place for litigation in the armament of those seeking public policy change for the handicapped was well described by Pennsylvania Association for Retarded Children (PARC) Attorney Gilhool who indicated that "litigation may be used to create a new place, a new forum, where citizens may turn to enforce their rights and perhaps create new rights" (1973, p. 601).

Despite the field's willingness to embrace the litigative approach (often to the inappropriate abandonment of legislative activities), little attention was focused on the use of attorney general offices and the development, altering, and implementation of administrative policies. Litigation and legislation, attorney general opinions, and administrative policies, (which are also often called rules, regulations, policies and guidelines) are the four major routes that exist for creation, modification, interpretation and implementation of public policy for the education of exceptional children.

Awareness of the positive changes that may be achieved through the effective use of all governmental routes to change has led The Council for Exceptional Children to broaden its guiding governmental relations policy statement. The new policy which formerly had focused on legislation now proposes the following language:

> Public policy (legislation, litigation, appropriation, regulation and negotiated agreements) has been the means by which exceptional children and youth have been guaranteed the educational opportunities of our society. The Council is deeply committed to the effective implementation of existing public policy in the interest of ex-

> ceptional children and youth. The Council seeks extension and creation of public policy in a manner which will encourage and augment quality service programs at all government levels. To provide the scope and kind of services needed, the Council endorses public policies that strengthen and enhance this nation's instructional programs for all children and youth. While such general provisions should benefit the exceptional child, the Council believes that specific policy provisions are necessary to offer those children and youth with exceptional needs the opportunity to develop their fullest potentials.

The purpose of this section is to examine the processes—the routes that must be traveled to achieve statutes, administrative policy, attorney general opinions, and litigation that build positive public policy for the education of exceptional children. The first of these chapters by Nancy Bolick focuses on state statutory law and presents an outline of the steps that must be followed to achieve new law, the procedures to use to implement initiative and referendum, and finally, brief consideration of the substance of state special education law.

Nancy Kaye presents in a following chapter an overview of the highly complex process of creating administrative policy, also known as rules, regulations, and guidelines. In addition to specifically examining the process as it occurs in ten states, a brief summary of the content is also included. The chapter by Henry DeYoung is a comprehensive review of the role of the state attorney general in altering public policy for the education of exceptional children. Again, the process is examined with regard to procedures and effect. Finally, the chapter by Alan Abeson is a review of the litigative avenue of change. Explained are the basic considerations and factors that must be weighed prior to, and during, litigation. The chapter is an intensive overview of this route, designed for the nonlawyer. In addition, although it is not the subject of this chapter, readers must be aware that, as with legislation, political factors and pressures operate to influence both the manner in which the processes occur and the eventual outcomes that are achieved.

GOVERNMENTAL DIVISION OF POWER

Any discussion of routes to public policy change must begin with a recognition of the traditional and necessary division of responsibility that exists between the three branches of government at both the state and national levels. Although every state constitution varies in length and in detail, each one, as well as the United States Constitution, specifies governmental division of powers.

The executive branch usually includes several elected officials (governor, treasurer, attorney general, lieutenant governor) who are the executives and who make up the administration. In addition, a maze of appointed officials staff subordinate agencies falling under the governor's control. Because the governor cannot effectively coordinate all their activities, a large number of agencies lead their own lives beyond the pale of effective gubernatorial direction or control. They often develop close ties with special interest groups and often try to get what they need from the legislature without much gubernatorial intervention. It is the administration that is responsible, frequently without supervision from the legislative branch, for the development and implementation of rules and regulations.

The United States judicial system consists of an extensive system of federal, state, and local courts which operate to adjudicate a wide variety of conflicts. State courts generally handle complaints about the violation of criminal laws and private agreements. Often challenges brought to the court focus on the constitutionality of a statute or its interpretation by an executive official, or are brought in response to complaints about the fairness of administrative procedures.

"The firm base for political authority in the American system is the will of the populace" (*Encyclopedia Americana*, 1957, p. 447). The people's will is represented by members of the legislatures at the national and state levels and by other elected bodies at the local and/or regional governmental level. The clear and overwhelming responsibility of these bodies is to create statutory law, rules, ordinances, or policies as a function of the level of government in which they operate.

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NANCY BOLICK

State Statutory Law

□ The state legislature traditionally commands mixed attention in the United States. On the one hand, it is recognized as important because it is a check on the executive branch of government, and is assumed to integrate public demands with local policy since its actions may directly affect the lives of its citizens. On the other hand, constitutional, political, and financial limitations, short sessions, and (frequently) inexperienced legislators render it less than fully effective in the eyes of many observers.

The constraints faced by most legislators are severe. In earlier days constitutions set few requirements, but recent attempts at reforming legislatures have resulted in the imposition of many constitutional limits on legislators' activity. Legislators are prohibited from enacting specific types of legislation, usually under the constraint of state and federal constitutions, for example, infringing on rights guaranteed to individuals under the Bill of Rights, or, in some states, establishing lotteries. Detailed, time consuming requirements have been imposed on procedure. For example, a constitution may specify that the legislature must keep a journal, or must have three readings for each bill, on separate days. Voter participation through initiative and referendum has been established. In addition to constitutional restraints, federal power over the states has also grown rapidly which in turn contributes to a reduction in state legislative authority.

Another change which has limited the authority of the legislature is the growth of the governor's role in dealing with it. In most states the governor has in fact become the "chief legislator." The governor has veto power in all states except North Carolina, and it is widely accepted that the principal bills in most legislatures are administration bills. In an active leadership role, the governor establishes broad legislative goals, outlines the administration's own program, denotes certain urgent problems, keeps administration bills visible to the press, and pressures the legislature to act.

The governor's role extends to finance as well; in 45 states he has authority to write the budgetary limitation on the legislature which tends to impair its autonomy and sometimes its integrity. Since programs cannot be carried out if they cannot be financed, the adopted budget determines what state government is all about.

A major impediment to efficient functioning of legislatures is the sheer volume of bills that they must consider. The amount of legislation that actually faces lawmakers is staggering. In recent years, each principal session of the 50 state legislatures introduced between 2,000 and 3,000 bills and resolutions (Edgar, 1975); usually about one-third are adopted. Many bills are minor amendatory measures incorporating technical changes into existing law, but increased urbanization, industrialization, and governmental control over state activities have increased the number of laws apparently required for society to continue functioning. US Office of Education Commissioner Sidney Marland (1972) estimated that during the 1971-72 state legislative sessions in the area of special education alone, 899 bills were introduced and 237 passed. Of the 237, 86 were described as major bills.

Many states are beginning to establish research services, which report on various issues that may or may not become the focus of legislation. Too many states, however, still have inadequate research assistance, staff, or office space for their legislators. What frequently happens, then, is that legislatures are somewhat dominated by outside forces because by themselves they cannot generate alternative sources of information. Yet, legislative creativity does exist.

THE STATE LEGISLATIVE PROCESS

Despite limitations, lawmaking is still the most important activity of the state legislature. A bill is introduced to the legislature by a legislator, who has received the bill from the governor, administrative agencies, political parties, special interests, individual citizens, or has generated it on his own. (In order to be passed, bills must progress through both houses of the legislature, which operate in all states except Nebraska. In all states, the upper house is known as the Senate and the lower as the House of Representatives or Assembly.)

The route that the bill travels varies from state to state but in most situations, the following steps occur:

1. Introduction and first reading.
2. Referred to Committee. The clerk or presiding officer designates the committee to which each bill is to be referred. In states where it is not unconstitutional, a committee reference is sometimes waived to expedite the progress of a bill, especially toward the close of a session.
3. Committee Reference. Despite the theoretical limitation of its advisory power the committee is the principal instrument of the legislature for adequate consideration of measures, and its recommendations carry great weight.
4. Hearings. Formal hearings are held to give committee members the opportunity to obtain information and views pertaining to the bill.
5. Amendments. These may or may not be added to the bill.
6. Committee recommendations and report. A committee may report the bill to the respective house or the bill may die in committee.
7. Second reading.
8. After a bill has been reported out by the committee, it is placed on the calendar of business for the scheduling of debate and a vote.
9. Debate and vote occur which create an environment in which the entire chamber may consider the bill. As a result the bill may be killed, contested, amended, or passed.
10. If a bill has made its way through both houses yet differences exist between the houses, conference committees made up of members of the original committees from each chamber convene to resolve differences.
11. A compromise bill emerges from the conference committee and is again the subject of votes by the full legislature.
12. After passage, the bill goes to the governor for signature or for veto.
13. If signed, the bill becomes law. If vetoed, the bill is returned to the legislature, where the veto can be overridden by a required number of votes.

The steps listed above are those basic steps which apply generally to any bill considered by any legislature. In actuality, the procedure is much more complex; a great deal of maneuvering occurs at all steps in the passage of a bill into law.

Interest Groups

As mentioned earlier, the governor, and to a lesser degree the state's administrative agencies, promote the major bills considered by the legislature. But the individual with a need or a demand has some recourse other than trying to influence the administration. He can ally himself with a special interest group which may lobby on behalf of a desired bill, or he can attempt effectively to use initiative and referendum.

Lobbyists for special interests, movements, or pressure groups have no official standing regarding the introduction of bills, but the legitimate exercise of their profession is well recognized. Interest groups are regarded as the principal alternative to political parties, or as the major supplement to their activity. They serve an important function: that of providing "free" information to legislators who are often ignorant of the many complex issues under consideration within a particular bill. Narrowly defined, the lobbyist is an agent who communicates the position of a group on a given issue to someone whom he believes will have some control over the outcome.

Many states and Congress require that all lobbyists and legislative counsel be registered; often the registration is the responsibility of the state secretary of state. Definitions of a lobbyist vary; in Texas, for example, anyone who merely testifies before a legislative committee is subject to registration (Hoffer, 1975). Individual states often have additional specific requirements that are applicable to lobbying groups and activities. A survey of state lobbying laws (Hoffer, 1975) shows the following variety of requirements:

> Although it is difficult to make comparisons, there are a few requirements that are common to many state lobbying laws. Based on current laws, the following numbered points apply to the states listed below:
>
> 1. Lobbyist must register.
> 2. Lobbyist's employer must register.
> 3. Registration required to lobby before state agencies (in addition to lobbying before the legislature).
> 4. Lobbyist must file financial reports.
> 5. Lobbyist's employer must file financial reports.
>
> Alabama—1,2,4,5
> Alaska—1,2,5
> Arizona—1,3,4,5
> Arkansas—1
> California—1,2,3,4,5
> Colorado—1,3,4,5
> Connecticut—1,5
> Delaware—1
> Florida—1,4
> Georgia—1
> Idaho—1,4
> Illinois—1,4
> Indiana—2,5
> Iowa—1,4
> Kansas—1,3,4
> Kentucky—1,2,4,5
> Louisiana—1
> Maine—1,2,5
> Maryland—1,4,5
> Massachusetts—1,3,4,5
> Michigan—1
> Minnesota—1,3,4
> Mississippi—1,2,4,5
> Missouri—1,4
> Montana—1,2
> Nebraska—1,4,5
> Nevada—1
> New Hampshire—1,4
> New Jersey—1
> New Mexico—1
> New York—1,5
> North Carolina—1,2,4
> North Dakota—1,2
> Ohio—2,4,5
> Oklahoma—1
> Oregon—1,4
> Pennsylvania—1
> Rhode Island—1,2,4
> South Carolina—1,4
> South Dakota—1,2,4,5
> Tennessee—1
> Texas—1,2,3,4,5
> Vermont—1,2
> Virginia—1,4
> Washington—1,2,3,4,5
> West Virginia—1,4
> Wisconsin—1,2,4,5
> Wyoming—1

Although there are many factors which determine which piece of legislation is successful, there is no question that interest groups produce effects, both positive and negative. Successful interest groups can be described as well organized and capable of delivering timely, useful information through a variety of means and mechanisms both prior to and during the time that a bill is receiving active consideration as well as for the duration of a legislator's public life. Skillful interest groups communicate with policymakers in a variety of ways including going through official channels of the legislature such as hearings; working with staff and the legislator; and personally interacting as the result of official, personal, and social contacts.

Legislative Tools

Individuals who operate successfully within the legislative process attend to the great number of details accompanying the consideration, passage, and implementation of public policy. Likewise, they are actively aware of official legislative personnel, services, and tools. Cognizance of these offices and functions can lead to the acquisition of much useful information. For example, legislative tools available in Ohio (Pierce, no date) are listed below.

> House and Senate calendars. A list of bills scheduled for floor action on a particular day, available from House and Senate bill rooms while supply lasts. The House calendar includes the hearing schedule.
>
> Journal. Summary of floor action (including voting records) of the House and Senate the previous day. Available from House and Senate bill rooms.
>
> Bulletin. Contains a list of all bills which have been introduced, and all action which has been taken on each one; issued periodically during the session; not available to the general public, although information about the current status of any bill may be obtained from the Clerk's offices.
>
> Copies of the House and Senate rules and the roster of members. May be obtained from the respective Clerk's offices.
>
> Acts. May be obtained from the office of the Secretary of State, by number.
>
> Executive Secretary of the House. Distributes equipment and materials; supervises legislative employees; provides reproducing services.
>
> Legislative Clerk of the House. Keeps a daily journal of proceedings of the House; maintains an index record of all bills and resolutions introduced; prints and enrolls bills and resolutions.
>
> Clerk of the Senate. The responsibilities of Legislative Clerk and Executive Secretary are combined in the office of the Clerk of the Senate.
>
> Legislative Reference Bureau. Drafts bills and resolutions; provides informational services and legal counseling.
>
> Legislative Service Commission. Codifies the law; checks all bills during several stages of the legislative process for code numbering and form; prepares analyses of bills; provides research and legal counseling for legislators; performs long range research between sessions.

Bills, Resolutions, and Joint Resolutions. Available from House and Senate bill rooms by number.

Committee Hearing schedules. Posted on blackboards in the back of the Senate chamber and in the hall next to the House bill room. The time, place, and numbers of bills to be heard are listed for the following week. Hearings are scheduled in the mornings, after sessions, and in the evenings during the legislative week.

Initiative and Referendum

About one-third of the states have provisions for initiative and referendum. Initiative is the right which allows individual citizens jointly to propose bills to the legislature or to the people directly at an election. The referendum is the power of the people to veto legislation. Following are the steps to be taken in initiating legislation:

1. Preliminary filing. A petition is drawn up by an interested person or group. Its form and the number of signatures required are usually specified by law. The number of required signatures varies from 3% to 15% of the electors of the state. Suitable forms are sometimes furnished by the secretary of state.
2. Filing with the secretary of state.
3. Submission to the legislature. In some states a proposed law must be submitted; in others, the legislature is bypassed and the measure prepared for the next election.
4. Publication of the proposal. The secretary of state publishes proposals in designated newspapers and provides for their printing and distribution.
5. Election.
6. Veto reconsideration referendum.

The initiative is not a widely used procedure, in part because it is a cumbersome, difficult, time consuming process which demands persistence. The job of acquiring a sufficient number of signatures, for example, can be exhausting. Moreover, from a philosophical viewpoint, many feel its use is inconsistent with representative government. On the other hand, particularly if other means have proved unsuccessful, the initiative is a way of making demands or interests known.

Table 1 lists the states which have procedures for initiative and referendum.

Table 1

Statewide Initiative Provisions

	Signatures required:					
State	*Bills*	*Const. Amends*	*Filing provisions with secretary of state of final signatures*	*Submission to legislature*	*Effective date*	*Preliminary filing before soliciting signatures*
Arizona	10%	15%	4 mos. before election.	No	Upon proclamation by the governor.	No
Arkansas	8%	10%	4 mos. before election.	No	30 days after election upon proclamation by the governor.	No
California	8%[*]	8%	90 days before election or 10 days before regular session.	Optional	5 days after declaration by secretary of state.	No
Colorado	8%	8%	4 mos. before election.	No	Upon proclamation by the governor but not later than 30 days after vote canvassed.	No
Idaho	10%	10%	4 mos. before election.	No	Upon proclamation by the governor.	Yes

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[*] Only 5% required if submitted to the legislature.

(Continued on next page)

Table 1—continued

State	Signatures required: Bills	Const. Amends	Filing provisions with secretary of state of final signatures	Submission to legislature	Effective date	Preliminary filing before soliciting signatures
Maine	10%	Not permitted	Within 45 days after the legislature convenes.	May adopt. If rejected may be submitted to vote.	30 days after governor's proclamation.	No
Massachusetts	3%	3%	Before the first Wednesday in December.	Required. If rejected, 5000 additional signatures required for submission to election.	30 days after election.	Yes
Michigan	8%	10%	10 days before commencement of legislative session.	Required for laws. If rejected or not acted on, submitted to next election. Const. Amdts. not submitted.	Laws, 10 days after declaration of vote. Const. Amdt. 45 days after election.	No
Missouri	5%	8%	4 mos. before election.	No	Upon proclamation by the governor.	No
Montana	8%	8%	4 mos. before election.		Upon proclamation by the governor.	No
Nebraska	7%	10%	4 mos. before election.		Upon proclamation by the governor within 10 days after official canvass of votes.	No
Nevada	10%	10%	30 days before regular session of the legislature.	Required. Legislature must act within 40 days. Becomes law if adopted subject to referendum. Submitted to election if rejected.	Takes effect upon final declaration of the vote.	No
North Dakota	10,000	10,000	90 days before election.	No	30th day after election.	No
Ohio	3%	10%	10 days before commencement of legislative session.	Required. If passed, is subject to referendum. If not passed, submitted to election upon submission of an additional 3% of signatures.	Upon certification by Board of Canvass as of date voted.	No
Oklahoma	8%	15%	Time for filing petition must be within 9 months of opening for signatures.	No	Upon proclamation of governor.	Yes

(Continued on next page)

Table 1—continued

State	Signatures required:		Filing provisions with secretary of state of final signatures	Submission to legislature	Effective date	Preliminary filing before soliciting signatures
	Bills	Const. Amends				
Oregon	8%	10%	4 mos. before election.	No	Upon proclamation of governor.	No
South Dakota	5%	5%	No special time required.	Yes. Legislature shall enact and submit all such measures to next general election.	Upon the day of completion of the canvass of votes by the State Canvassing Board.	No
Utah	5%	5%	10 days before commencement of legislative session.	Yes. If legislature fails to act, must be submitted to election if additional 5% of voters added to signatures.	5 days after date of governor's proclamation.	Yes
	10%	10%	4 mos. before election.	No	5 days after date of governor's proclamation.	Yes
Washington	10% (not more than 50,000)	10%	4 mos. before election or not less than 10 days before regular session of the legislature.	Optional. If filed 10 days before regular session, measure takes precedence and, if enacted, becomes law subject to referendum or may be referred by legislature to election. If rejected, or not acted upon, submitted to next election.	30 days after election.	No

STATE STATUTES AND THE EDUCATION OF EXCEPTIONAL CHILDREN

The education of exceptional children has been the subject of extensive state law. In recent years, such law has become comprehensive in defining eligible children and the services to be provided. While for most children the delivery of educational services is a local responsibility, it is the state that is ultimately and constitutionally responsible. As such, state law is the major policy avenue that defines these individual and joint responsibilities.

The comprehensiveness of state law for the education of exceptional children can be examined by considering the following eleven elements. These elements are the same as those used in the *Digest of State and Federal Laws for the Education of the Handicapped* (Bolick, 1974).

1. *Right to an education:* State constitutional provisions relating to the establishment of educational programs in general; compulsory attendance laws and their disclaimers regarding some handicapped children; policy or intent statements of statutes; indication of responsibilities, mandatory or permissive.
2. *Population:* Age and other criteria that determine which children are legally considered exceptional.

3. *Identification, assessment and placement:* Provisions for the location of exceptional children through census, screening, and referral; policies concerning assessment and placement including personnel to be involved, types of data to be used in making a placement, sequence and substance of procedures to be used.
4. *Administrative responsibility:* Mechanisms for administering special education and the responsibilities of state and local education agencies for development of policies.
5. *Planning:* Provisions for the establishment and maintenance of planning efforts at the state and/or regional and/or local levels.
6. *Finance:* Special provisions for the calculation, distribution, and expenditure of state provided funds.
7. *Administrative structure and organization:* Organizational patterns which may be used to deliver special education services (including regional or multidistrict approaches) such as tuition contracting, education service centers, intermediate units; cooperatives; and special districts.
8. *Services:* Policies defining special education services; descriptions of various program options, class size, caseloads; provisions for transportation and research.
9. *Private placement:* Definition of exceptional children eligible for private placement; procedures for approving private placements; rates of financial assistance, licensing procedures, and methods of monitoring placements.
10. *Personnel:* Certification requirements and financial assistance for personnel training.
11. *Facilities:* Provision for the construction and financing of special education facilities.

LAW AND FUTURE POLICY

Although the most visible policy advances of the 1970's have come about through judicial decisions, there has also been extensive rewriting of state special education statutes. As those who are experienced in trying to achieve shifts in public policy indicate, one avenue should never be selected without regard for the other avenues. This is particularly true in terms of litigation and legislation. In most respects courts are limited in their ability to allocate resources, for this is a responsibility which traditionally falls upon legislators. It is for at least this reason that progress in policy will continue to occur in state legislation. Moreover, advocates for policy change must remain aware that many needs of exceptional children do not typify the issues which qualify for judicial intervention; the route to follow will be in the nation's legislatures.

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NANCY KAYE

Administrative Policy

□ Decisions produced by administrative agencies in the form of policies, rules and regulations, or guidelines significantly affect the personal life of every citizen. This is surely the case with the decisions made by state boards of education and superintendents, or commissioners of public education, for part of the impact of state administrative agencies is derived from their discretionary power in promulgating rules. The key word is "discretionary," in the legal sense, it refers to an "area within which agencies may choose freely between alternative courses of action basing decisions on ad hoc considerations" (Cooper, 1970).

Applying this definition to the state board of education one can easily project a variety of ways in which this agency may have an impact on the citizens of the state. When an agency is granted the power to adopt substantive rules, the agency, in effect, assumes to some degree the role of a legislature, because substantive rules, for the most part, have the force of law which compel or prohibit action on the part of those subject to the agency's jurisdiction. The legal phrase *Corpus Juris Secundum* connotes the significance of rules and regulations. It states that "a valid rule or regulation promulgated by a public administrative agency is binding on the agency as well as on all those to whom its terms apply . . .moreover, an administrative rule or regulation is addressed to, and sets a standard of conduct for all to whom its terms apply" (Ludes, p. 410).

Since administrative policy has such critical impact, it seems imperative that professionals and consumers of services be informed about the procedures which develop agency policies and its associated power. Because each state has unique procedures for developing the agency rules, the process is neither easily understandable nor easily explainable.

Traveling through the process of state administrative policymaking is a journey accompanied by confusion and often some despair. The confusion stems from the wide variability among states and the fact that even an individual state code is not the last word on procedures required to promulgate policies; many agencies within the state can develop additional procedures to meet their own needs. The despair can arise as a natural result of an individual's or group's desire to effect change through state administrative law, only to find that the procedural alternatives available to the agency may be used to subvert change efforts. This discussion of procedures is applicable to the creation of new rules and amending existing rules. Change can be made in the delivery system through the vehicle of state administrative law, but it is essential to know the specific procedures required.

A basic inadequacy in many states is the lack of information provided to the public concerning the specific policies in force and the procedures used to establish them. Georgia's code, (which may be unique in this respect) requires agencies to describe their organization to the public, stating their general aims, methods of operation and means by which the public can get information or submit requests. Even with this type of provision, however, a word of caution is necessary, since a tendency can exist to provide content so minimal and/or inconsequential that in effect, it is no better than no information. Such inadequacy is serious because the subjects of an agency's jurisdiction are unable to ascertain the rules to which their conduct must conform.

Although no uniform state process exists, certain key aspects of the promulgation process are included in all states to varying degrees. To illustrate the variance which states exhibit in the process of developing their rules and regulations, a review follows based on a 1974 examination of ten states demonstrating wide variance: Alaska, Connectticut, Florida, Georgia, Idaho, Illinois, Massachusetts, Michigan, New Mexico, and Ohio.

Certain parameters are included in all administrative policies studied; Cooper (1970) lists a number of areas, including definition of agency, definition of rule, availability of rules, procedures and rule making, filing, and publication which originate in individual state law and which produce considerable state by state variance.

DEFINITION OF TERMS

The definition of the term *agency* is of key importance because the content of the definition significantly controls the implementation of other sections of the code. For example, if the definition of *agency* is too narrow, the state board of education could be excluded from being an agency and thus might be subject to different policy making procedures. Alaska, Florida, and Illinois have adopted broad and comprehensive definitions of *agency*. Alaska law states that an "agency means and includes all departments, offices, agencies, and other organizational units of the executive branch, except as may be expressly excluded by this Act" (*Alaska Statutes*, Sec.44.62.640 (a)(4). This definition contrasts with Ohio which states an "agency means an official board or commission having authority to promulgate rules" (*Ohio Revised Codes Annotated*, Sec.119.03). Another contrast is found in New Mexico which defines *agency* as "any state board, department or office authorized by law to make rules" (*New Mexico Statutes Annotated*, 71-6-23). New Mexico also lists particular agencies to which its State Administrative Procedures Act applies. Some states such as Georgia, Massachusetts, and Michigan specifically exclude particular agencies.

The force and effect of a policy, its power, can be directly related to the definition of a *rule*. An appropriate definition will also help to eliminate an agency's proclivity to issue "bulletins," "announcements," and "guides" which really function as rules but which have not been subjected to the procedures required for rule adoption. Definitions of *rule* found in the statutes vary widely. In the states studied, none appeared to be so narrow as to deprive citizens totally of their rights nor so broad as to require total adherence to any and every procedure for adoption of policy, internal or external.

Some examples indicate the variation. Idaho and Georgia define a *rule* as "each agency's regulation, standard or statement of general applicability that implements, interprets or prescribes law or policy or describes the organization, procedure or practice requirements of any agency" (*Idaho Revised Code Annotated*). Ohio defines a *rule* as "any operation, adopted, promulgated and enforced by any agency under the authority of the laws governing such agency" (*Ohio Revised Codes Annotated*).

RULE MAKING PROCEDURES

The variance between states appears to be greatest in the process of rule making. Such variance is most obvious in the administrative procedures acts of the states, but is undoubtedly compounded when an agency such as a state board of education alters the state process to meet its own needs. Complications arise from the facts that there are different basic purposes for rule making and that some rules serve more than one purpose. Although categories of rules are not precise or clearcut, Cooper (1970) presents three general categories of rules:

1. Procedural rules describe the methods an agency will use to carry out its functions.
2. Interpretive rules interpret and apply provisions of the statute under which an agency operates.
3. Legislative rules represent an opinion (beyond the agency's) as to what the statute requires, and/or is the result of the legislature specifically delegating its power to the agency.

There are five distinct elements to rule making: notice, hearing, emergency rules, petition for adoption, and sanctions.

Notice. There is considerable variation among states in the design and substance of providing notice. Notification time of proposed rule making is 10 days in Michigan, 15 in Virginia, 20 in Georgia, 21 in Massachusetts, and 30 in Alaska, New Mexico, and Ohio. Alaska, Michigan, Connecticut, and Massachusetts agencies must publish the specifics of their rule making procedures. Ohio alone requires filing notice with the secretary of state. In order to have meaningful dialogue at subsequent hearings, all interested parties should receive notice concerning the nature and specifics of the agency proposal before the hearing and possible adoption of the policies. Michigan provides for a "statement of terms or substance of the proposed rule or a description of the subjects and issues involved" (*Michigan Public Acts of 1969*, No.306). Alaska publishes an informative summary while Connecticut, Georgia, Massachusetts, Ohio, and New Mexico provide only limited direction in this area.

Required notification of time, date, and place, and the method of presenting viewpoints was found in all states studied. Most states distinguish between written and oral presentations and include guidelines to govern the selection of each. Some states like Idaho send notices of hearings to "all who requested advance notice of proceedings in writing" (Idaho Revised Code Annotated), in addition to publication in newspapers and other public displays. It is important to note that in certain states the responsibility to be informed rests with the individual or organization; they must initiate the request for notice.

Hearings. While the separation of notices for hearings and the hearings themselves may be ephemeral, a few salient points are important. The major reason for conducting hearings is to test the degree of public acceptance or rejection of a proposed rule. Most states, therefore, offer citizens some opportunity to participate in hearings. Ohio, however, goes further and offers what appears to be a strong method by which the public can meaningfully participate in the rule making proceedings. States such as Georgia guarantee agency consideration of testimony while more general requirements are found in Alaska and Connecticut.

Emergency rules. If there is a demonstratable need for a rule and the prescribed procedures effectively interfere with that need, emergency rules may be necessary. However, the criteria for "emergency" must be neither so broad as to allow invoking emergencies when none exist, nor so narrow as to preclude needed action. Alaska, Florida, Georgia, and Massachusetts have adopted procedures which require the presence of two conditions prior to adoption of emergency rules; the preservation of health, safety, or welfare and the existence of an imminent or immediate threat. The length of time an emergency rule may remain in effect varies greatly. Michigan's limit is six months; Alaska's, Florida's and Massachusetts', three months; Ohio's two months.

Petition for adoption of rules. Adoption, amendment, or recession of a rule in five of the states studied may be requested by any individual. While this option is valuable, it must also be remembered that if a statute so specifies the development of a rule, any of these actions may be an alternative way to effect a policy change.

Sanction. If a rule is adopted without compliance with the rule making procedures, it will be declared invalid in states such as Alaska, Michigan, Florida, and Ohio.

FILING AND PUBLICATION OF RULES

Each state studied required that proposed rules be filed with an official of the state. Michigan, Alaska, Illinois, Ohio, Georgia, Massachusetts, Connecticut and Florida require filing with the Secretary of State; New Mexico requires filing with the State Records Administrator; Idaho files the rules in its central office. Michigan and Connecticut require publication of a rule as a condition for its promulgation. Florida and Alaska require 30 days between publication and effective date while Michigan requires 15, Georgia requires 20, and Illinois and Ohio, 10. Massachusetts administrative policies become effective upon filing.

The need to be aware of all written statements of policy or interpretations adopted or used by an agency in discharging its function is critical to the education of an informed citizenry. If secrecy is the position of an agency, distrust and inefficiency are natural results. To this end, Georgia, Connecticut, and Alaska have requirements concerning availability of rules.

EXAMPLES OF DEVELOPING ADMINISTRATIVE POLICY

The process and content of state administrative policy are as varied as the states are numerous. The following section attempts to illustrate such diversity by describing the complete process for developing special education rules and regulations in four states. It must be noted that a recurring problem in attempting to describe varied levels of procedural complexity is a lack of published, organized information; data for this section, in fact, was largely obtained through telephone contacts.

Michigan

1. A citizen may demand or a statute may require the development of rules. If a statute

does not specifically require the development of rules, the state board of education may still do so. Changes in rules may be initiated by a properly credentialed citizen.
2. The state department of education develops the rules.
3. The rules are submitted to the state board of education for their approval of public hearings.
4. Notice of public hearings are distributed.
5. Hearings are conducted.
6. As a result of the hearings, the state department of education does or does not alter the proposed rules.
7. The state department of education returns the proposed rules to the state department of education for approval to permit the submission of the rules to the legislative services bureau, the attorney general's office, and the joint legislative committee on administrative rules.
8. Rules are submitted to the legislative service bureau for the purpose of checking form, classification, and numbering.
9. Rules are submitted to attorney general's office for the purpose of verifying their legality.
10. Rules are submitted to the joint legislative committee on administrative rules for the purpose of verifying legislative intent.
11. The state board of education formally adopts rules in the form approved by the legislative service bureau, the attorney general's office, and the joint legislative committee on administrative rules.
12. The rules are sent to the governor with the certificates from the three other agencies at least 10 days before filing with the secretary of state.
13. The rules are filed with the secretary of state.
14. The rules become official 15 days after filing with the secretary of state.

Connecticut

1. The department of education develops the rules (often in consultation with concerned groups).
2. The rules are sent to the state board of education to be placed in the *Connecticut Law Journal*. If the rule is short, the entire statement is printed; if the rule is lengthy, a summary is printed.
3. A 20 day waiting period is required after publication so that the state board of education or a concerned person or group can petition for a hearing, although the state board of education is not required to hold hearings.
4. Hearings may or may not be held.
5. The state board of education approves the rules.
6. Rules are sent to the legislative committee to assess consistency with the law and for their subsequent approval.
7. Rules are submitted to the attorney general's office for legal review and approval. A 30 day waiting period is required.
8. Rules are submitted to the secretary of state to publish in the *Connecticut Law Journal*. Usually within 36 hours, the secretary of state acknowledges the receipt of the rules at which time they become official.
9. If the legislative committee or the attorney general's office denies approval, the state board of education is required to rework the rules and resubmit them.

Idaho

1. The department of education usually develops the rules with input from concerned groups.
2. Rules are sent to the deputy superintendent for review and recommendations.
3. Rules are submitted to the superintendent of public instruction for recommendation.
4. Rules are sent to the state board of education. If ratified, the rules are official; if not ratified, they are returned to the department for rewriting.
5. The department of education disseminates the rules when they become official.
6. The rules are filed with the state board of education. The attorney general's office is not required to be involved in the development of rules and regulations.

(Such noninvolvement is one reason why the procedure is described as rather general and informal.)

Georgia

1. The department of education develops the rules.
2. Rules are sent to the state board of education for approval.
3. If the state board of education approves rules, they become official.
4. The department of education disseminates and files the rules.
5. If necessary, the attorney general may be contacted for informal approval.

THE CONTENT OF SPECIAL EDUCATION STATE ADMINISTRATIVE POLICY

The content of administrative policy appears to offer as much variety as does the process itself. Like its parent legislation the content varies from state to state as a function of the specificity of the statute, of the power of the state education agency, and of the overall policy objectives of individual state administrators. State regulations tend to act as baselines for the local education agencies who must fit their policies into the state directives. The states can also use such regulations to measure local education agency compliance with state directives. In turn, the legislature can use the regulations to evaluate the administration's performance as represented by the Department of Education in implementing legislative intent.

Following is a summary of the contents of rules and regulations organized according to Bolick (1975).

Right to an Education

The right to an education traditionally is stated in the constitution of the state. Since the right to an education is specifically under the jurisdiction of statutes, (including compulsory attendance laws) administrative policy is generally lacking in this area. Two major components of the compulsory attendance law are age of required attendance and exemption to the law. This is the only category where such a condition exists.

Population

Population includes the definition of a handicap and the minimum and maximum age required of children eligible for special education services. Some states specify population by law, others use a combination of administrative rules and laws. The usual format is that the law specifies the major categories (learning disabled, emotionally disturbed, mentally retarded, and the like), and the rules specifically define each category. Very frequently, law also defines age of eligibility.

Identification, Assessment, Placement

Within this category there are differences in approach and substance. In some states, such as South Dakota, the rules and regulations set payment fees for services. Screening for a variety of purposes (as opposed to census) appears in the law or in the rules, depending upon the state. For example, Massachusetts by law screens for defects in sight and hearing, while Ohio by rules screens for sight and hearing. Identification assessment and placement considerations are specified either in the law or in the rules. Table 1 summarizes the wide variations apparent in the state policies studies.

Table 1

Variations by State in Use of Laws and Rules in Selected Processes

	Identification		*Assessment*				
States	*Census*	*Referral*	*Evaluation*	*Local case conference committee*	*Review*	*Records reports*	*Placement*
Alaska	–	L	–	–	–	–	L
Connecticut	L	L	L	L [a]	–	L	L
Florida	L	–	R	L [a]	–	L	R
Georgia	L	R	R	R	R	R	R
Idaho	L	–	R	R	–	–	R
Illinois [b]	L	R	R	R [a]	R	R	R
Massachusetts [c]	L [d]	L	L/R	R/L	L	L	L/R
Michigan	–	–	R	R [a,e]	R	R	R
New Mexico	L	R	R	R [a]	R	R	R
Ohio	–	R	R	R [a]	R	R	R

NOTE. L indicates process by law. R indicates process by rules.

[a] Denotes language related to parent notification and/or due process procedures.

[b] Defines impairment of the child.

[c] Laws and rules effective 9/1/74.

[d] Rules state census directions.

[e] Denotes regional screening teams.

Administrative Responsibility

This area is primarily defined by law, although Florida and Illinois specify responsibilities in their rules. Florida includes delineation of the assistance offered to local school districts by the state special education staff in its administrative policies. Illinois policy states characteristics of local school boards and their responsibilities, and ultimate responsibility for quality of local programs within local school districts can be found in the state's rules and regulations.

Planning

This category refers to the methods by which a state plans for its handicapped children, including the establishment of cooperative services between two or more districts. In some states the rules call for the development of specific plans with specific indication of the information required. Georgia and other states establish a "local professional advisory committee" in their rules.

Finance

Most states provide for financial reimbursement in law. There are exceptions, however: provisions exist in Massachusetts rules for tuition, differential travel, and costs of instructors of braille; Georgia rules relate state subsidies to specific programs. Some state policies declare that state financing will be disapproved if pupils are not approved according to the existing standards of eligibility.

Administrative Structure and Organization

In many states, administrative structure and organization are defined by administrative rules. A common approach, however, is typified by Michigan where the law *and* the rules provide this definition. Often, the combination of law and rules requires that administrative structure be combined with planning efforts.

Services

A majority of states clarify services in their rules. Transportation, class size, age range, summer programs, evaluations, and curriculum are among the services frequently mentioned.

Private Services

Rules frequently mention private services. Six of the states studied (Connecticut, Georgia, Idaho, Illinois, Massachusetts, Ohio) specify whether children may be placed in or out of state. Idaho and Illinois rules allow for contracting with private facilities. State administrative policies in Georgia, Idaho, Illinois, and Massachusetts determine who is eligible to be served in private facilities. Eligible costs are specified in New Jersey rules. Curriculum requirements for private facilities are stated in the rules in Massachusetts.

Personnel

Most states provide for the certification of personnel in their rules.

Facilities

Facility requirements such as plant planning, room size, equipment and location of rooms are not often mentioned either in law or in administrative policy. In the states where this is discussed, material is found in both the law and in the rules and regulations.

THE IMPACT OF ADMINISTRATIVE POLICY

Despite the fact that there is a paucity of information available about the content and process of administrative policy making, such directives are potentially potent in expanding the policy-base for the education of exceptional children. In those states where major policy is incorporated into statutes, the degree of impact may be reduced, but in states which have legislative rules, the impact can be quite substantial. The rules and regulations are a process which have the potential for producing positive change. Yet, this potential can be realized only if citizens understand developmental process and assume active roles in these forms of governmental decision making.

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HENRY DE YOUNG

Opinions of the Attorney Generals

□ An often overlooked avenue that can be used to establish state wide governmental policy changes resides in the office of the state attorney general. The attorney general is the chief legal officer of the state and serves as the legal advisor for both state officials and state agencies. It is the responsibility of the attorney general to represent state agencies when they are involved in legal actions. Often the attorney general is called upon to interpret law and also review state administrative policies.

Increasingly, state attorney generals are becoming involved in policy decisions that affect the education of exceptional children. Such an opinion in New Mexico in 1971 had significant impact on the state's policy with regard to its responsibility for educating exceptional children. The New Mexico Attorney General ruled in response to a question from a legislator that the state's permissive special education law was contrary to provisions in the state's constitution that free education must be made available to all children (Op. Attorney General, Dec. 22, 1971).

BACKGROUND

The office of state attorney general has its origins in the common laws of England. The king had attorneys which were appointed by him to prosecute criminal cases as early as the 13th century (Harding, 1966). These attorneys were somewhat synonymous with the present day attorney generals.

Most states, when they developed their constitution or became part of the union, established or continued the office of attorney general. However, 8 of 50 states went for a period of time without a state attorney general. Vermont, having joined the union in 1791, went the longest. It had no attorney general until 1904. All states, however, since 1911 have had attorney generals (Morse, 1937).

The attorney general is an integral part of most state governments. His duties, powers, and daily functions, however, differ from state to state. Depending on the authority given to the attorney general by the state constitution and/or statutes, in addition to the interrelationship with the branches of state government, some attorney generals have extremely powerful positions.

Some of the duties of the attorney general are listed in the constitutions of California, Delaware, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York, Oklahoma, Puerto Rico, Texas, Vermont, and the Virgin Islands. The specific duties are prescribed by law in Alabama, Arkansas, Colorado, Georgia, Nebraska, North Dakota, Rhode Island, South Dakota, West Virginia, and Wisconsin. In Kentucky, Montana, North Carolina, South Carolina, Utah, and Washington, some of the duties are listed in the constitution, and mention is made in the constitution that other duties are to be prescribed by law (Office of Attorney General, 1971).

The topics which are discussed in an attorney general's opinion also vary from state to state. Generally, they deal with questions of the law, and the responsibility of state officials in carrying out the law. If the issue in the question to be answered is before the courts, the attorney general will frequently not give an opinion. Although it is not always true, it is a general rule followed in all states.

Unlike the US Attorney General, who is entirely a part of the executive branch of government, a state attorney general may have as strong a relationship with the legislative and judicial branches of state government as with the executive branch. In surveys done by the Committee on the Office of Attorney General (COAG), it was found that a majority of attorney generals believe they are a part of the executive branch of government (Office of Attorney General, 1971). However, by issuing opinions regarding the state's laws and practices, the attorney general is an integral part of the judiciary of each state. The relationship to the legislature comes from the fact that in most states, the attorney general must give advice to legislators upon request.

The attorney general is elected by the people in 42 states. In Alaska, Hawaii, New Hampshire, New Jersey, Pennsylvania, and Wyoming the attorney general is appointed by the governor. This means of selection is also used in Guam, Puerto Rico, Samoa, and the Virgin Islands. In Maine, the attorney general is appointed by the legislature, and in Tennessee by the state supreme court (Office of Attorney General 1971). Qualifications for the office of attorney general are found in Table 1.

Table 1
Qualifications for Attorney General

State	Age	Residence and citizenship	Admission to bar
Alabama	25	US citizen (5 years in state)	No
Alaska	None	US citizen	No
Arizona	25	10 years US (5 in state)	Yes
Arkansas	21	1 year in state	No
California	None	US and state citizen	Yes— 5 years (statutory)
Colorado	25	US citizen (2 years in state)	Yes
Connecticut	None	Elector	Yes— 10 years
Delaware	None	US citizen elector	Yes
Florida	30	US citizen elector	Yes— 5 years
Georgia	25	US citizen elector	Yes
Guam	None	No requirements	No
Hawaii	None	Elector (1 year in state)	Not required
Idaho	30	US citizen (2 years in state)	Yes
Illinois	None	US citizen	Yes
Indiana	21	Elector	Yes
Iowa	None	Elector	No
Kansas			Yes (case law)
Kentucky	30	US citizen (2 years in state)	Yes— 8 years
Louisiana	None		Yes— 5 years
Maine			Yes
Maryland	None	US citizen (10 years in state)	Yes— 10 years
Massachusetts	None	None	Yes
Michigan	21	Elector (6 months in state)	Yes
Minnesota	21	US citizen for 3 months	Not statutory
Mississippi	26	US citizen elector	Yes— 5 years
Missouri	None	US citizen (1 year in state)	Not required
Montana	30	US citizen (2 years in state)	Yes
Nebraska	None	No requirements	No

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Table 1—continued

State	Age	Residence and citizenship	Admission to bar
Nevada	25	US citizen (2 years in state)	No
New Hampshire	None	No requirements	Yes
New Jersey			No
New Mexico	30	US citizen (5 years in state)	Yes
New York	30	Elector	Not required
North Carolina	21	Elector	No
North Dakota	25		No (but implied)
Ohio	21	US citizen elector	Yes
Oklahoma	31	US citizen (10 years elector)	No
Oregon	None		Yes
Pennsylvania	None	(No requirement for office)	No
Puerto Rico	21	US citizen elector	Yes
Rhode Island	21	US citizen elector	Yes
Samoa	None	US citizen	No
South Carolina	None	US citizen elector	Not statutory
South Dakota	25	1 year in state	Yes (case law)
Tennessee	None	None	Yes (implied only)
Texas	None		No
Utah	25	US citizen elector	Yes
Vermont	21	US citizen elector	No
Virgin Islands	None	US citizen	Yes
Virginia	21	US citizen elector	No
Washington	21	Elector (1 year in state)	Yes
West Virginia	25	US citizen (5 years in state)	No
Wisconsin	None	US citizen elector	Yes
Wyoming	21	US citizen elector	Yes
United States	None	Required by general law	No

Despite the fact that the attorney general is the chief legal officer of the state and is intimately involved with state agencies, some agencies in some states employ their own counsel. The Departments of Education in Florida, Kentucky, Maryland, New York, New Mexico, Puerto Rico, Texas, Vermont and Wisconsin have at least one attorney employed as their counsel (Office of Attorney General, 1971). The relationship these attorneys have with the office of state attorney general varies from state to state. In some states, they are employed by the attorney general's office, and are able to issue official opinions. Some agencies use their counsel only for informal advice and refer important questions to the office of the attorney general. Other agencies employ counsel which have no relationship at all to the office of the attorney general. In a survey done by COAG, most state attorney generals said that all legal counsel employed by state agencies should be under the control of the office of attorney general.

As has already been stated, 34 states outline in their constitution and statutes some of the specific duties of their state's attorney general. Understandably, then, the attorney general has constitutional or statutory powers to perform certain duties. He also has common law powers. Common law powers, however, are much more difficult to determine and vary from state to state. These powers, generally speaking, are those powers which court decisions have attributed to state attorney generals through common law. They would, of course, vary from state to state, depending on each state's court decisions.

In the study done by the National Association of Attorney Generals, the most frequently cited listing of the attorney general's common law powers is found in *People v. Miner*, a case decided more than a century ago. The court found that:

> The attorney general had the power, and it was his duty:
>
> 1. To prosecute all actions, necessary for the protection and defense (sic) of the property and revenues of the crown.
> 2. By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.
> 3. By *scire facias*, to revoke and annul grants made by the crown improperly, or when forfeited by the grantee thereof.
> 4. By information, to recover money or other chattels, or damages for wrongs committed on the land, or other possessions of the crown.
> 5. By writ of *quo warranto*, to determine the right of him who claims or usurps any office, franchise, or liberty, and to vacate the charter, or annul the existence of a corporation, for violations of its charter, or for omitting to exercise its corporate powers.
> 6. By writ of *mandamus*, to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted.
> 7. By information to chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers.
> 8. By proceedings *in rem*, to recover property to which the crown may be entitled, by forfeiture for treason, and property, for which there is no other legal owner, such as wrecks, treasure trove, &c. (3 Black, Com., 256–7, 260 to 266 id., 427 and 428; 4 id., 308, 312.)
> 9. And in certain cases, by information in chancery, for the protection of the rights of lunatics, and others, who are under the protection of the crown. (Mitford's P., 24–30, Adam's Equity, 301–2). (Office of Attorney General, 1971, p. 33)

Some states have restricted the attorney general's common law powers; Louisiana is a state which does not even recognize common law. At the other extreme, Illinois is a state where the courts have determined that not only does the attorney general have common law powers, but that power cannot be limited. Table 2 describes the common law powers of each state's attorney general.

Table 2

Common Law Powers of the Attorney General

State	*Has such powers*	*Not decided*	*No such powers*	*Comments*
Alabama	X			Where not limited by statute or constitution
Alaska	X			Where not limited by statute or constitution
Arizona			X	Case law denies powers
Arkansas	X			Where not limited by statute
California	X			Most powers now defined by statute
Colorado	X			Limited case law
Connecticut	X			Where not limited by statute, const. or court
Delaware	X			Case law does not specify powers
Florida	X			Where not limited by statute
Georgia		X		Insufficient case law
Guam		X		No statutes or case law
Hawaii	X			Statutes give attorney general common law power
Idaho	X			Has power to institute certain actions
Illinois	X			Has extensive powers, through case law
Indiana			X	Courts limit attorney general to statutory power
Iowa	X			1970 case affirmed power
Kansas	X			Case law
Kentucky	X			Where not limited or modified by statute
Louisiana			X	Common law not recognized in state
Maine	X			By statute and case law

(Continued on next page)

Table 2—continued

State	Has such powers	Not decided	No such powers	Comments
Maryland		X		Not developed by legislature or courts
Massachusetts	X			Wide range of powers through case law
Michigan	X			Wide range of powers through case law
Minnesota	X			By case law, not statute
Mississippi		X		Not fully established by statute or case law
Missouri	X			By case law, not statute
Montana	X			By case law
Nebraska	X			Where not limited by statute
Nevada				By case law, has all common law power
New Hampshire	X			By case law
New Jersey	X			Reaffirmed by statute and constitution
New Mexico			X	Courts deny attorney general common law power
New York		X		Case law in conflict
North Carolina	X			Implied from statute and case law
North Dakota		X		Insufficient case law
Ohio			X	No case law, but state code
Oklahoma	X			By case law
Oregon		X		Case law divided, but powers essentially statutory
Pennsylvania	X			Extensive case law
Puerto Rico			X	No case law
Rhode Island	X			By case law
Samoa		X		No case law
South Carolina	X			Certain powers exercised
South Dakota			X	Courts limit attorney general to statutory power
Tennessee		X		No statutes or case law
Texas		X		No statutory basis; case law divided
Utah	X			1969 case affirmed power
Vermont	X			By statue
Virgin Islands	X			In the absence of laws to the contrary
Virignia	X			Has powers, by virtue of constitutional status
Washington	X			Where not limited by statue
West Virginia	X			Case law
Wisconsin			X	Dicta only in recent cases
Wyoming		X		Insufficient case law
United States			X	

ATTORNEY GENERAL OPINIONS: FORMAL AND INFORMAL

Generally, there are two principal types of attorney general opinions: formal or official opinions, which are written and almost always published and deal with important state wide interests; and informal or unofficial opinions, which are also written, but not always published and are not thought to be of statewide interest.

Practices regarding opinions of the attorney general vary from state to state. Some states consider all opinions formal or official opinions; in other states, few opinions are considered formal. The attorney general is the one who usually determines whether an opinion is formal or informal. In all states, the attorney general issues advisory opinions. Some of these may be in the form of a telephone call, letter, or memorandum. In other states, as previously indicated the only form used is a formal written opinion. In some states, even a letter or phone call is considered an official opinion. The number of opinions given also varies a great deal from state to state.

ISSUANCE OF OPINIONS

The statutes of some states define the categories of people to whom an attorney general may issue an opinion. Some state constitutions also delineate the persons who may receive an opinion. Although the categories of persons vary from state to state, all attorney generals issue opinions to their governor and to heads of state agencies. A majority of states allow attorney general opinions to be issued to legislators, local prosecutors, and other local officials. Only in a few states are opinions issued to private individuals. The statutes of each state usually make it mandatory that certain state officials receive an opinion if they request one (Office of Attorney General, 1971). The right to *ask* for an opinion and the possibility of *receiving* one are two very different matters. In most cases the attorney general makes the decision whether or not to issue an opinion. A specific rule to follow is discussed later.

REQUESTING AN OPINION

A specific route to follow for an individual or group wishing to get a formal opinion from their state attorney general may be acquired by calling the state attorney general's office. This method would seem to be the easiest and most practical.

A pilot test of this procedure was undertaken by this author. In 1974, several state attorney general offices were contacted. They readily gave information as to the various routes one could take to get a formal opinion. In addition, the likelihood of getting an opinion when using the various routes was provided. For example, in one state, more than a thousand requests were made by private individuals for a formal opinion, with only a few being written because of time and other factors. However, when an individual or group, through their legislator, had an opinion requested, it was sure to be written.

THE EFFECT OF AN OPINION

What effect an attorney general's opinion has on the recipient is very difficult to explain for most states. Minnesota is the only one where the *law* says that an attorney general's opinion, if issued to the Commissioner of Education, is binding unless overruled by the courts. Since attorney general opinions interpret the law, three states—Alabama, Mississippi, and Pennsylvania—provide immunity for those who follow the opinion. This would be a motivating factor (to follow the opinion), as one could not be held liable for following the attorney general's advice in solving a particular question of law.

In most states, however, the opinion of the attorney general is only advisory and not binding on the recipient. However, some states view an attorney general's opinion as binding or follow it as a matter of custom. A survey done by the Committee on the Office of Attorney General found that in most states, the courts would consider the opinion persuasive. Most would believe that an opinion would "immunize the recipient on questions of good faith, negligence, or interest" (Office of Attorney General, 1971, p. 268). For example if a local school district received an attorney general's opinion stating that the law is interpreted to mean that handicapped students do not have to be provided with a full day of school, very likely the school could not be sued for damages if it followed that opinion and it was found unlawful by a court. As might be expected, The National Association of Attorney Generals believes that formal opinions of an attorney general should be binding on the person or agency requesting the opinion, unless overruled by a court (Office of Attorney General, 1971).

Although some attorney generals are appointed by the governor, most are elected, and most are considered part of the present state administration. As one of his primary duties, the attorney general interprets the laws for state officials. In this respect, the interpretation of law by the attorney general probably becomes the policy of the state. By not following an attorney general's opinion, a state official or department is inviting court action. If the attorney general, for example, interprets the laws of the state to mean that all handicapped children are entitled to transportation services to and from school, no matter how long or short the distance, and no provisions are then made by the State Department of Special Education to insure this, very likely the Department, as well as local officials, could be sued. The State Department of

Table 3

A Numerical Tabulation of the Number of Attorney General Opinions by Subject in Each State

State	*Right to an education*	*Population*	*Identification and placement*	*Administrative responsibility*	*Planning*	*Finance*	*Administr. structure and organization*	*Services*	*Private*	*Personnel*	*Facilities*	*Total of opinions summarized*
Alabama		1		1		1			1			1
Alaska	1			1				1	1			2
Arizona	1	1				7	2	3	3	1		17
Arkansas	1			1			1		2			4
California		1				1			1			3
Colorado												
Connecticut	4	1		4		4		5	2			17
Delaware	1					1						1
Dist. of Col.												
Florida	1	1								1		2
Georgia	1	1		1		1	2	1	2	2	1	9
Hawaii												
Idaho												
Illinois	5	3		1		6	1				1	17
Indiana												
Iowa	1	2			1	1		1				5
Kansas												
Kentucky	2	2				1	1	3	3			12
Louisiana			1				1	1	1			3
Maine	1		3	2		4	1	2	1	2		15
Maryland	1	1				3					1	6

Massachusetts	3		1	1	1	1		3	5			14
Michigan	1	1		1	1	3	1	1			1	5
Minnesota	3	8	1			21	1	7	1			41
Mississippi												
Missouri	1					1		1				3
Montana												
Nebraska	3	1		1		3			1			7
Nevada	1	2		2				1				5
N. Hampshire												
N. Jersey												
N. Mexico	1	2		2		2		1		1	1	10
N. York	3	1		8		1		4				16
N. Carolina		1										1
N. Dakota	1	2				1			1			4
Ohio	2	2	1	2		7	4	1	4		1	19
Oklahoma												
Oregon	1			1		1						3
Pennsylvania	4											4
Rhode Island							1					1
S. Carolina	3	2			2			2	1	1		11
S. Dakota	1	3				4		2				7
Tennnessee												
Texas	1	1		1		3	1	2	1			10
Utah		1					1					2
Vermont											1	1
Virginia	2					1						3
Washington	1			1								1
W. Virginia	1											1
Wisconsin	1	1		1		2		3	2			9
Wyoming								2		1		3
Survey National									1			1
Total	53	42	7	32	5	81	18	47	34	9	7	296

Education would be in a very vulnerable position since in most cases, the attorney general would be the children's lawyer in the suit.

DISTRIBUTION OF OPINIONS

As has already been stated, most opinions are written and published by the office of the attorney general. Many of these are sent to law libraries around the country. In an informal survey of state directors of special education, (Final Report, 1975), 38 said that they felt sure that all opinions regarding special education would be distributed to local agencies who were affected. Four of the directors, however, qualified their statements, saying that they would only send an opinion if it was to their advantage, or if it was important enough. It should be noted that, of those 38 directors who said that they felt an attorney general's opinion would be distributed, 28 said that their office would do the distributing. Seven said that the superintendent or commissioner of education would do the distributing, one said that the department of education would be responsible for this. One said that they were published; two said that their office and the commissioner of education would distribute the opinions; and only three said that the state attorney or attorney general or a state official would do the distributing. One did mention that several sources would probably do the distributing, including their own office. It would seem that any attorney general's opinion with state wide implications, such as one dealing with the right to education for handicapped children, would probably be distributed by the state agency charged with the implementation of the opinion.

CONTENT OF OPINIONS

In 1974, an attempt was made to collect all past attorney general opinions regarding the education of handicapped children. A letter was sent to each state attorney general asking for all opinions regarding the education of the handicapped. Each attorney general's office sent those opinions which, in their estimation, affected the education of handicapped children in their state. These opinions were summarized, and then categorized, using the *Digest of State and Federal Laws: Education of Exceptional Children* (Bolick, 1974).

It is unfortunately beyond the scope of this chapter to include all the individual summaries. In addition, there were several limitations encountered during the collection and summarization process that must be mentioned. First, not all opinions affecting the education of the handicapped in each state may have been collected. The attorney general in each state, or one of his assistants, determined which opinions in their estimation affected the education of handicapped children and which would be sent in. It is probable that people unfamiliar with exceptional children or the education of exceptional children did the search. It is also possible that some opinions may have been overlooked. The task of finding specific opinions is a difficult process in many states—even for one who is familiar with the subject, as not all states publish and index their attorney general's opinions. This is particularly true for the earliest opinions.

Second, the fact that there are official and unofficial opinions creates a problem, since in some states, only official opinions are printed while in others both official and unofficial opinions are printed. Further, in some cases there was no indication as to whether an opinion was or was not official. The importance of an official versus an unofficial opinion varies as indicated from state to state. Table 3 is a numerical tabulation of the number of attorney general opinions in each state. The number of opinions in each category is also given. The data presented should not be used for a state by state comparison because some opinions were placed somewhat arbitrarily in categories to coincide with the *Digest of State and Federal Laws*. However, the data do provide the reader with a general idea of the issues which are most frequently asked each state attorney general. The central theme is what kind, to whom and how much service must be provided—the right to education, the population to be served, administrative responsibilities. These seem to be the issues most frequently brought to the attention of the attorney general. Apparently, few problems have arisen in the past regarding identification, planning, administrative structure, personnel, or facilities. Of interest as well is that an analysis of the number of opinions received, which spans the years 1897 to 1973, reveals a significant increase in opinions in more recent years. Although this could be explained by the fact that the response of the attorney general was more focused on recent years, it could also be attributed to the great changes that have occurred in the totality of public policy for the education of exceptional children.

THE ATTORNEY GENERAL OPINIONS AS A ROUTE TO CHANGE

The means of becoming attorney general, the powers inherent in the office, and the force of actions taken by the attorney general, differ from state to state. It is his responsibility to protect the public interest of the citizens of each state. It is interesting to note that in the 9th power given to the attorney general in *People v. Miner*, direct reference is made to the handicapped, even though the language is somewhat archaic. Although this route to special education policy change has not been frequently traveled to date, it does possess potential, and must be considered by change agents concerned with the education of exceptional children.

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ALAN ABESON

Litigation

□ During the past few years, the nation's courts have been flooded with lawsuits relating to government's responsibilities to handicapped children and adults. These suits have focused on the right of handicapped children to obtain an appropriate publicly supported education, the right to treatment including education for institutionalized handicapped children and adults, and the use of improper classification and placement practices to restrict children's opportunities to obtain an appropriate education. This effort has occurred because of the recognition that litigation is another governmental avenue that can be used to achieve positive policy changes for handicapped children. Much of this section dealing with litigation was originally published by the State/Federal Information Clearinghouse for Exceptional Children of the Council for Exceptional Children under the title *Legal Change for the Handicapped through Litigation*. The document was refined and updated for this volume.

Decisions to pursue policy changes through use of the courts must be made in light of two basic points. First, changes sought through litigation may be very similar to directions the party named as "defendant" has tried to achieve. The "defendant's" ability to achieve those objectives may have been frustrated because of barriers such as inadequate agency commitment or financial support. In this sense, litigation (or the threat of litigation) may be used as a lever to bring about the action desired by both the potential defendant and the plaintiff. Thus, litigation (or the threat of litigation) may be used by potential defendants to motivate their respective agencies and policy makers to initiate the desired change. The second major point is that litigation is not necessarily a personal attack upon parties named as defendants. Frequently, complaining parties are aware that the party named as defendant has tried to produce desired change. It is also known in some of the cases that named defendants have spent days preparing defenses for the suit, and nights assisting the plaintiffs to prepare their arguments. It is in the best interests of the handicapped to prevent litigation or the threat of litigation from becoming personal, because regardless of the decision, it is likely that the named defendants will retain a major role in implementing the desired change.

THE APPROPRIATENESS OF LITIGATION

Litigation, only one avenue that can be used to obtain positive public policy change, becomes appropriate when the "constitutional or statutory rights" of exceptional children are abridged and when administrative remedies for redress have proven either ineffective or inefficient in protecting those rights.

First, because litigation is both costly and lengthy, it is usually in the best interest of all parties to first attempt other avenues for producing change such as enacting legislation, changing administrative practices, and/or exhausting all administrative remedies. Frequently a court will require that all administrative avenues be thoroughly investigated before legal intervention can begin. Second, even when a suit is brought, it is not uncommon that many of the important issues are resolved outside of court through negotiation between the administrative agency and the complaining party. Often, to achieve a solution prior to litigation, attorneys will enter into negotiations with the responsible administrative agency to use its authority to remedy the existing situation. If the negotiations are unsuccessful, then a lawsuit to compel enforcement could follow.

If it is believed that a handicapped child's or adult's rights are being violated, and everything possible has been tried to remedy this, it may then be appropriate to consider litigation. Litigation can be used in a variety of situations including the following:

- Many childern identified generally or specifically as handicapped, including the mentally retarded, emotionally disturbed, physically handicapped, learning disabled, multiply handicapped, visually handicapped, speech and hearing handicapped, or any other disability category are in many jurisdictions unlawfully prevented from receiving an appropriate public education.
- Many children, often from low socioeconomic circumstances or minority cultures, are, in violation of the due process provisions of the United States Constitution and assorted federal and state laws, classified as handicapped for the purpose of assigning them inappropriately to special education programs.
- Many handicapped children are recommended by public education agencies for placement in private school programs with all or a portion of the tuition remaining the responsibility of the family, in violation of the requirement that all children must be provided with a free, publicly supported education.

An example of successful litigation to produce change concerning the rights of handicapped children is *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C.1972). This was a class action suit that was filed in 1971 in the District of Columbia to compel the school board to provide appropriate education for retarded, physically handicapped, emotionally disturbed, hyperactive, and all other handicapped children. The plaintiffs charged that the city provided insufficient funds for children needing special education. A relatively small number of exceptional children were provided with tuition grants enabling them to obtain private instruction, others were placed in public school classes and hundreds of children were forced to remain at home receiving no formal education. The suit sought to establish the constitutional right of all children to an education commensurate with their ability to learn. It was charged that although these children could profit from an education, either in regular classrooms with supportive services or in special classes adapted to their needs, they were denied admission to the public schools or excluded after admission, with no provision for alternative educational opportunities or periodic review. Second, these children were excluded, suspended, reassigned, expelled, and transferred from regular public school classes without affording them procedural safeguards and due process of law.

In August, 1972, Federal Judge Joseph Waddy declared that exceptional children have a constitutional right to a public education, and ordered the District of Columbia to offer all children in the plaintiff class appropriate education placement within 30 days of the decision. The judge also directed the District school system to create due process procedures under which no pupil could be suspended from school for disciplinary reasons for more than two days, or be placed in, denied, or transferred to and from special education class without a public hearing. This ruling had national impact as the first court decision explicitly stating that all handicapped children have a constitutional right to a public education.

The lack of funding is frequently cited by public officials as the primary reason for the absence of adequate education programs for exceptional children. In their *Mills* defense, the District School System and the school board stated that it was impossible to provide special education for the handicapped unless Congress appropriated millions of dollars for the purpose. The judge responded by saying, "The inadequacies of the District of Columbia public school system, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the exceptional or handicapped child than on the normal child."

Of course, not all litigation attempts are successful. Even with the most conscientious of attorneys, and what seems the most "noble" of causes, cases are lost. Aside from legal considerations, factors such as the judge's familiarity and disposition toward an issue, the degree of public support for the issue, and the social and political timing for bringing the suit may all have bearing on the outcome of the case. In short, litigation can be a most useful vehicle for bringing about change, but there are no guarantees that, at the end of the road, the desired destination will have been achieved. Even when a case is won, it may only signal the beginning of much more work to translate the victory decree into improved programs. In other circumstances, the negative formal outcome of a law suit may produce a positive result. Although a judge may rule against the plaintiff on the legal issues, the lawsuit may be the catalyst for the initiation of fruitful negotiations and may have served to crystalize the issues in a way that attracts the interest of the public and more important, public policy and law makers.

AFTER APPROPRIATENESS HAS BEEN ESTABLISHED

Preliminary Considerations for Selection of Parties

There are many important decisions which must be made by potential parties to a lawsuit. These decisions range from meeting basic prerequisites for actually entering court to selecting strategy. Among the basic prerequisites is that the parties seeking to bring a lawsuit must have been injured or wronged. This means the plaintiffs must have an issue or cause of action based on a violation of some legally protected interest. In order to have "standing" to sue, the plaintiffs themselves must be ones who have actually been injured or have direct relationships to persons being injured. Under some conditions, being a taxpayer is sufficient to establish standing for the purpose of a lawsuit. In *Rainey v. Watkins*, Civil Action No. 77620-2, Chancery Court of Shelby County, Tenn., April 5, 1973, two of the plaintiffs in the right to education case are described as taxpayers who must bear the tax burden resulting from welfare assistance to and institutional care of all handicapped persons who do not receive an education.

The plaintiffs must initially determine what type of relief or remedy they want the court to grant. A decision will also affect who will be named by the plaintiffs as the defendants in the lawsuit. Depending on the type of injury which the plaintiffs have suffered and the number of people who have suffered the injury, a decision must also be made whether to bring an individual action or a class action lawsuit. Extensive consideration must be made by the plaintiffs in selecting an attorney. The defendants, if government, will be represented by attorneys employed by the state or respective local agencies. Another key step for both sides is the collection of all the facts relevant to the case and for the plaintiffs alone to establish the facts of the alleged violation.

Causes of Action/Legally Protected Rights

A lawsuit is made up of one or more issues or causes of action. For example, in *Mills v. District of Columbia*, one cause of action was the denial of an appropriate publicly supported education to schoolage handicapped children. A cause of action can be acted upon by the courts because it involves a legally protected right. Citizens and residents of the United States are guaranteed certain rights under the US Constitution, state constitutions, federal and state statutes, and state common law. In seeking to vindicate the rights of the emotionally disturbed, mentally retarded, or other handicapped persons, certain provisions of the US Constitution and many state constitutions are relied upon, such as, the right to equal protection of the law. The legally protected right is essential to the court's jurisdiction, for without an established cause of action, courts lack jurisdiction, i.e., they are totally without power to act at all.

The 14th Amendment to the US Constitution declares: "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." This has been interpreted to mean that it is unlawful to discriminate against a class of persons for an arbitrary or unjustifiable reason. This is a particularly important right for exceptional children seeking appropriate education opportunities. In *Brown v. Board of Education*, 347 U.S. 483 74 S. Ct. 686, 98L. Ed. 873 (1954), the famous desegregation case, the court said:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

In the *Mills* case described earlier, this reasoning was applied directly to "exceptional children."

The right to due process of law as provided by the 14th Amendment of the US Constitution states that "no state may deprive any person of life, liberty, or property, without due process of law." This right encompasses both substantive and procedural due process, although the cases regarding the handicapped have involved primarily the latter area. From a procedural viewpoint, due process refers to the right to have laws applied with adequate safeguards so that a person will not be subject to arbitrary and unreasonable actions. In *PARC v. Commonwealth of Pennsylvania*, C.A. No. 71-41 (3 Judge, E.D. Pa.), a case similar to *Mills* regarding the right to an education for the mentally retarded, the courts ordered extensive due process procedures providing in part that before a child can be expelled, transferred, or excluded from a public education program, he or his parents or guardian has a right to a fair hearing, a right to receive notice about the hearing, and a right to have counsel present at the hearing.

Related to the right to education and due process is the right to appropriate classification, i.e., the right to be protected from inappropriate labels such as "mentally retarded," "emotionally disturbed," "behavior problem," or any other term denoting education difference calling for "special" treatment. Evidence is increasingly being collected indicating that a number of children placed in special education classes, or suspended, expelled or transferred from public school classes, are from minority and nonEnglish speaking cultural backgrounds. Critics charge that many of these children have been classified on the basis of culturally biased tests that do not accurately indicate their learning ability.

For example, in *Diana v. State Board of Education*, C-70 37RFR, in California, nine Mexican American public school students from age 8 through 13, alleged that they had been inappropriately placed in classes for the mentally retarded on the basis of biased standardized intelligence tests. The plaintiffs came from home environments in which Spanish was the only or predominant language spoken. When the case was decided in 1970, the defendant school districts agreed to several procedures to ensure better placement, including testing in children's primary language, the use of nonverbal tests, and the collection and use of extensive supporting data. This issue is also continually being raised for judicial resolve.

Decisions by the US Supreme Court have established that all constitutional rights are present rights—rights which exist now and which must be promptly vindicated unless there is an overwhelmingly compelling reason to justify delay. For example, in *Mills*, the court required program delivery for the affected children within 30 days.

Basic Legal Approaches for a Lawsuit

If a person's constitutional rights are violated by anyone acting under color of state law (under the authority of the state), he may bring a case. Although there is no statute creating the permission of a cause of action against federal officials charged with denying a person his constitutional rights, it is well established that federal courts will grant relief for such abuses. Thus, officials of government may be sued for not performing statutory obligations.

In addition to gaining recognition of specific rights for exceptional children and handicapped adults, a party might bring a common law tort action. The common law refers to the body of law which has been built through case by case decisions. A tort is a civil wrong for which a private citizen may recover money damages. Acts constituting tort under the common law are generally of two types—intentional and negligent. Examples of the former are assault and battery. The defendant will be liable if he intended to do the act that harmed the plaintiff. Negligent torts, however, result from the breach of one individual's duty of ordinary care to another and do not require intent. The defendant will be liable if he owes the plaintiffs a duty, and if his breach of the duty was the proximate cause of plaintiff's injury.

The Plaintiffs

All plaintiffs must have standing and capacity to sue. Standing, as has already been pointed out, means that the plaintiff himself must be the one who suffered or is in immediate danger of suffering injury, or that he has a substantial interest. Parents or guardians have standing to sue in the names of their children or wards. For example, a California right to education suit, Case v. *California*, Civil No. 101679, Super. Ct. Riverside County, CA, filed January 7, 1972; 4 Civil 13127, Ct. of Appeals, Fourth District, CA., filed July 16, 1974, was brought on behalf of Lori Case, a schoolage child, by her guardian ad litem, "for the litigation" Estelle Case, her mother. A problem arises when an individual seeks to sue because someone else's rights have been violated. In many states a person cannot assert that the rights of another have been violated or that a statute is unconstitutional if the statute is not unconstitutional as applied to the person actually bringing the suit. An individual may be outraged at conditions at a training school for the mentally retarded, for example, but if he is not the one suffering from the conditions there, he cannot bring suit in his name. Instead, he must seek to have the suit brought in the names of the injured children because it is their rights which are violated by the inadequate care and facilities. This rule is based upon a policy of economy and judicial resources as well as on the fact that a person directly injured will be most likely to prosecute his case with energy and diligence. In some instances, however, an organization can sue on behalf of its members. This is being done by several state associations involved with handicapped children, such as federations of The Council for Exceptional Children, affiliates of the National Association for Retarded Citizens, and the Association for Children with Learning Disabilities.

A plaintiff must also have the capacity to sue or be sued. Capacity is determined according to the laws of the area where a person resides. Infants (minors) or incompetents must have a representative to sue on their behalf. The court is authorized to appoint such a representative (a next friend or guardian ad litem) if no suitable family members or friends are available to protect the interests in the litigation. For example, *Mills* was brought on behalf of Peter Mills and six other named children of schoolage by their next friends. The next friends included the children's parents or guardians, and in their absence, the District of Columbia Welfare Rights Organization, US Representative Ronald Dellums, a member of the House Committee on the District of Columbia, Reverend Fred Taylor, and the Director of FLOC (For Love of Children, Inc.), an organization seeking to alleviate the plight of homeless and dependant children in the District of Columbia.

Other Forms of Participation in a Suit

The courts will often allow a party to present supporting arguments for one side (either plaintiff's or defendant's) of the case. This usually requires the role of amicus curiae or "friend of the court." Normally, this involves submitting a brief containing written arguments, but, under extraordinary circumstances, the right to participate in the case orally can be granted. This means that "friends" of both sides can be presented and are subject to cross examination by the opposite side. Many of the right to education and right to treatment cases that have occurred involved the presentation of testimony by "amici." Persons not named as plaintiffs can, however, provide significant assistance in the litigation by helping to perform the required extensive research and fact gathering as well as to provide or raise any necessary funds.

Types of Relief Courts Will Grant

Suits designed to produce social change usually seek the types of relief that are described below. Readers should keep in mind that the focus of this discussion is civil litigation where private individuals are seeking redress of personal grievances; criminal litigation is where the state or the federal government seeks to prosecute commission of acts which have been defined as "criminal" by statute.

Declaratory relief is where plaintiffs ask the court to declare or state clearly to defendants that plaintiffs have certain rights. A request for this kind is usually coupled with a request for injunctive relief whereby the plaintiffs ask the court either to order defendants to alter their actions or to restrain them from taking some specified action. For example, in *Harrison v. Michigan*, E.D.Michigan, 50 Div. C.A. No. 38357, brought on behalf of all children in Michigan being denied a publicly supported education because they were labelled retarded, emotionally disturbed, or otherwise handicapped, the plaintiffs asked the court to declare that the defendants' acts and practices denied the plaintiffs' Due Process of Law and Equal Protection under the 14th Amendment of the US Constitution and to enjoin the defendants from excluding plaintiffs and the class they represented from a regular public school placement without providing (a) adequate and immediate alternatives, including but not limited to, special education, and (b) a constitutionally adequate prior hearing and periodic review of their status, progress and the adequacy of any educational alternative.

Injunctive relief includes temporary restraining orders and preliminary and permanent injunctions which are court orders requiring or forbidding certain actions. Temporary restraining orders and preliminary and final injunctions differ in that they are issued for varying lengths of times, at various stages of the litigation process, and on the basis of varying degrees of proof.

The Time Required to Litigate

The length of time depends on the type of case being brought, on the schedule and work habits of the court, and on whether any appeals will be involved. Attorneys involved with the *Mills* case engaged in 8 months of preliminary work prior to filing of the suit and 11 months of effort from the time of filing to decision. The case is active to this time as a result of continued plaintiff efforts to gain implementation through the use of the courts. There is no specific answer to this question.

KINDS OF SUITS

An injunction is primarily to enjoin (forbid) certain actions. Relief is characterized as either legal or equitable. Any relief that can be compensated with money damages is termed legal. Where money damages would be an inadequate solution, equitable relief must be sought. Generally, an action for injunction will not lie unless it is in prohibitory form, that is, commands a person to refrain from doing an act, or prevents a threatened but not yet existing injury. Mandatory injunctions do exist, however. One is mandamus, to compel a public official to perform his legally defined responsibilities. The other is used to compel restoration of conditions existing before an aggressor has acted, e.g., a writ of habeas corpus.

In *Wyatt v. Aderholt* 334 F. Supp. 1341, M.D. Ala. (1971) 32 FF. Supp., an Alabama right to treatment case, the court issued a temporary restraining order before the case was finally decided requiring Alabama state officials to immediately hire 300 employees to care for the institutionalized residents because the court was convinced that the patients' lives were endangered by the existing substandard conditions at the institution.

Injunctive relief might also include appointment of a master who is given authority to take over the challenged institution or system and supervise implementation of the court's decision. Two masters were appointed by the court in *PARC* to oversee the implementation of the consent agreement established in this case. The appointing of a master to take over the administration of an institution is unusual.

Stays are orders delaying enforcement of judicial orders until some further step can be taken, such as appealing the decision to the next highest judicial level. In *Wyatt*, after the plaintiffs won in the district court, the defendants attempted to obtain on order staying enforcement of the district court's decision, which if implemented would have required massive changes in the state's institutions, until the 5th Circuit Court of Appeals had reviewed the case.

Another kind of suit more infrequently used seeks a writ of mandamus requiring public officials to perform their legal responsibilities. Writs of mandamus have been sought in some states where local districts ignored statutory requirements to develop plans for the education of handicapped children. Plaintiffs may also seek a writ of habeas corpus, which is used to obtain release from unlawful confinement. The institutionalized petitioner in *Rouse v. Cameron* sought such a writ. Habeas corpus can also be used to protest conditions of confinement as well as to challenge the confinement itself.

Money damages may also be sought. For example, in *Lebanks v. Spears*, Civil Action No. 71-2897 E.D. La. April 24, 1973, a class action brought on behalf of eight Black children and all others similarly situated in the Parish of Orleans, Louisiana, who were allegedly labelled "mentally retarded" without valid reason or ascertainable standards and then denied a public education, each plaintiff sought $20,000 for the damage suffered. That claim was ultimately dropped by the plaintiffs in the course of developing the agreement.

The various kinds of damages include nominal damages awarded to a plaintiff as a token of the injury, compensatory damages, awarded to repay the plaintiff for the injury actually incurred such as medical expenses and/or pain and suffering, and punitive damages awarded when the injury is committed maliciously or in wanton disregard of the plaintiff's interests.

In requests for relief, court costs and attorneys' fees may also be sought. While court costs are usually granted to the prevailing or winning side as a matter of course, attorneys' fees in the past have rarely been recoverable and usually occurred only where a statute provided for their recovery or where the court exercised its discretion to transfer the fees. Recently, however, there has been a trend on the part of courts to award attorneys' fees to lawyers representing poor clients on the theory that encouraging such private law enforcement of constitutional rights is for the good of all society and that such lawyers are actually acting as "private attorney generals." Attorneys' fees were awarded by the district court in *Wyatt*.

Whom to Sue

There may only be one defendant involved in a case or there may be several people responsible for alleged legal injuries. In suing a state or local government, as in *Mills*, the plaintiffs name specific persons with administrative responsibilities, and include all the necessary parties having the authority to make desired changes. For example, the defendants in *Mills* included the Board of Education of the District of Columbia and its members, the Superintendent of Schools for the District and subordinate school officials, the Director of Human Resources in the District of Columbia, certain subordinate officials, and the Mayor of the District of Columbia.

The doctrine of sovereign immunity is often raised by state or local government units to argue that suit cannot be brought against them.

This immunity, however, is often waived by statutes so that suits are possible. However, even if sovereign immunity is not waived, it usually does not affect the right to sue individual officials rather than the state itself, on the theory that officials do not have the authority to act or are acting beyond their authority. Most state and federal officials have immunity from tort actions for money damages, for negligent or wrongful acts, for omissions committed within the scope of their employment, or for failure to use due care in enforcing a statute, although such immunity does not extend to actions seeking injunctive relief. Injunctive relief, however, can be obtained if the issue involves violation of a constitutional right.

Private Action

A private action is a legal action on behalf of one or more individuals or on behalf of an organization. Therefore, whatever the outcome of the case, it will directly affect only the individuals specifically named as plaintiffs in the case, although the indirect effects can be widespread.

Class Action

In a class action a named plaintiff(s) brings an action both for himself and on behalf of all persons similarly situated. In *Mills*, the suit was undertaken not just on behalf of Peter Mills and other named plaintiffs but significantly also on behalf of a class of plaintiffs—all "exceptional" children who resided in the District of Columbia. In the *Wyatt* case, the named plaintiff represented all residents of the state of Alabama involuntarily confined to the state's hospitals.

Plaintiffs must satisfy many complex procedural requirements in order to maintain a class action in most jurisdictions. The federal courts are considered to have one of the most lenient sets of standards for class actions while in contrast, many states have more restrictive rules controlling such actions.

In a federal suit pursuant to Federal Rule of Civil Procedure No. 23, one or more members of a class may sue as representatives of all the other members of the class if:

1. The class is so large that it would be impractical to make all members plaintiffs.
2. There are questions of law or fact common to the members of the entire class.
3. The claims of the representatives are typical of the claims of the entire class.
4. The representative parties will fairly and adequately protect the interests of the entire class.

These are not the only qualifications but are the basic prerequisites for a federal class action. This is a complicated area in which legal counsel is essential.

One factor that frequently underlies decisions to bring class action lawsuits is that such suits can contribute significantly to achieving policy changes for large numbers of people.

If the named plaintiff in a class action is dropped from the case, for example, the whole action does not necessarily become "moot" or academic and therefore unsuitable for a hearing before the court. In a private action, if Peter Mills had been admitted to public school classes during the litigation procedure, the case would have become moot because he would no longer have been denied an education and thus would no longer have a cause of action against the District of Columbia. In a class action, if Peter had been placed in a school, the case could have continued since there were other children who would be directly affected by the outcome of the case.

Second, if a temporary restraining order is issued prior to a full hearing the order applies to the class rather than just to the named plaintiff. In private action, the temporary restraining order would only apply to the individual plaintiff.

Third, any final relief granted by the court is for all members of the class, and is not limited to the named plaintiff. Again, using *Mills* as an example, a public school education is required not only for Peter, but for all children in the class of exceptional children excluded from school in the District of Columbia.

Fourth, any member of the class can initiate contempt proceedings if the order of the court is not implemented with respect to him individually. Consequently, if an order is not implemented in respect to any member of the class—any handicapped child—a representative of the child can return to court to have the relief enforced, and possibly, to have authorities fined or jailed for failing to obey the court order.

Although class actions are often desirable, it must not be forgotten that the risks are also higher in such actions. If a class action suit is lost, it will be more difficult for others in the class to bring another suit on the same issues involving the same circumstances. Also, if the named plaintiffs are not fully representative, have not suffered all of the injuries of other members of the class, all relevant causes of action may not be brought out in court, and thus, the relief granted may not be sufficient to provide all members of the class with adequate remedies.

Resolution Prior to Trial

It is important to understand that at any point in the process a plaintiff or defendant can reach a settlement in which either side may concede all of the points raised in the case or reach a compromise as to any or all of the issues. Negotiations may be held during the course of the litigation leading to resolving of certain issues or facts and thus removing them from consideration by the court. If an out of court settlement is achieved, the opposing party may agree to stop the action at issue. In a class action, however, the court must approve any settlement.

If settlement is made, the court's enforcement powers will not be behind the agreement, unless a judicially approved consent agreement is obtained which means court ratification or approval of settlement. In *Pennsylvania Association of Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 E.D.Pa. 1971 and 343 F. Supp. 279 E.D. Pa. 1972, a federal district court ordered that all mentally retarded children in Pennsylvania be given access to a free public program of education appropriate to their learning capabilities, pursuant to a consent agreement between the parties. Obtaining a consent agreement probably saved lengthy litigation, obviated the possibility of an unfavorable decision for the plaintiffs, and enhanced the prospect of the desired action to occur.

The willingness of parties to settle will depend on the objectives sought by the lawsuit. If the lawsuit is a test case to try to establish a certain right, as well as vindicate the rights of the plaintiffs, one purpose of the litigation may be to have the court recognize the right, and articulate its reasons, so that the decision will have value as a precedent. If these objectives are sought, settlement may not be possible.

In some situations the threat of a lawsuit alone can accomplish all that is desired by a suit. Approximately two thirds of all litigation is settled out of court. Settlement is less expensive and time consuming than litigation and may lead to a more satisfactory conclusion than would result from a court decision. Out of court negotiated settlements may be sought at any stage in litigation proceedings, even when the case has reached the appellate level.

Selection of an Attorney

There are many considerations which should be weighed in the selection of an attorney. Perhaps the most significant is that he has a positive reputation as being competent. Equally important is that his past includes trial experience that reflects commitment to the position taken by the parties he represents. This does not require commitment to the issues in question, but commitment to do the best possible for his clients. The attorney selected must also be one in whom the client has confidence. Regardless of the position taken or the issue in question the attorney and client will spend much time together which can be enhanced if the relationship is built on confidence. Because litigation on behalf of handicapped persons is a fairly new area of the law, the attorney must be willing to draw on already established programs for information and technical assistance. A listing of 10 of these groups follows:

1. The Council for Exceptional Children, 1920 Association Drive, Reston, Va. 22091, (703)620-3660.
2. National Center for Law and the Handicapped, 1235 No. Eddy Street, South Bend, Indiana 46617, (219)288-4751.
3. Mental Health Law Project, 1751 N Street, NW, Washington DC 20036, (202)872-0670.
4. American Association on Mental Deficiency, 5201 Connecticut Avenue, NW, Washington DC 20015, (202)244-8143.
5. National Association for Retarded Citizens, 2709 Avenue E East, Arlington, Texas 76010, (817)261-4961
6. National Legal Aid and Defenders Association, 1601 Connecticut Avenue, NW, Washington DC 20009, (202)462-1608.
7. American Civil Liberties Union, 84 Fifth Avenue, New York, New York 10011, (212)725-1222.
8. Harvard University Center for Law and Education, 38 Kirkland Street, Cambridge, Massachusetts 02138, (617)495-4666.
9. United Cerebral Palsy Associations, Inc., 66 East 34th Street, New York, New York 10016, (212)889-6655.
10. National Center for Law and the Deaf, Gallaudet College, 7th and Florida Avenues, NE, Washington DC 20002 (202)447-0445.

SELECTING THE APPROPRIATE COURT

Initially in the litigation process, the plaintiffs' attorney must select the appropriate court to hear the case. There are two court systems in the United States, the federal courts and the various state courts.

While in some areas of law, courts in both the state and federal systems may have the authority under the United States or state constitutions to hear a case, state courts generally become involved with issues of state law or practices, and federal courts hear cases involving parties who live in two or more states; and also cases where a question involving the US Constitution or other federal law is raised.

The Federal Court System

The federal court system consists primarily of 93 Federal District Courts, 11 US Circuit Courts of Appeal and the Supreme Court of the United States. (See Figure 1.)

The 93 Federal District Courts are the trial level courts in the federal system where suits are actually heard. Each state has at least one district court. The number of judges in each court varies, depending on the size of the district and the number of cases it hears, but most district courts have two or more judges. The southern district of New York, which covers an area of especially high intensity, has 24 judges. Usually a single judge will try a case and hand down a decision. However, in some cases a three judge court is required, consisting of district court judges and appeals court judges. For example, a three judge court might be necessary when plaintiffs seek to enjoin (stop) a state from taking some action which allegedly violates their interests. It is used primarily to seek an injunction on the basis of unconstitutionality of state laws.

There are other federal courts, not relevant to this publication, such as the tax court, the military court of appeals, and the court of claims.

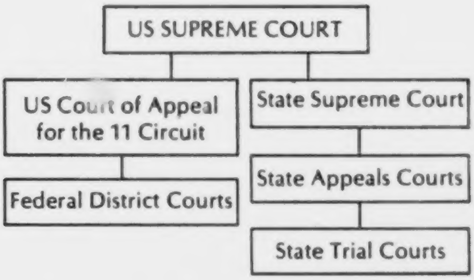

FIGURE 1. Structure of the Court Systems.

The US courts of appeal review decisions of the federal district courts. There are eleven courts of appeal, one for the District of Columbia and one for each of the ten other circuits in the United States. Each circuit includes from 3 to 10 states and the territories. Each appeals court has from 3 to 15 judges. Three judges are usually assigned to each case.

The courts of appeal have jurisdiction to review decisions of the district courts, as well as to review orders of many administrative agencies and, in some cases, to issue original decisions. The appeals process is explained later.

The Supreme Court is the highest court in the country and consists of a chief justice and eight associate justices. The justices are appointed by the President with the approval of the Senate, as are all federal judges. The court has the power to review all matters of law relating to the US Consititution and is the final appellate power on all other matters of law.

The State Court System

Each state court system is established under the constitution and statutes of individual states. Consequently, each state system may have a different number of courts and each court may have different kinds or limitations of power upon the cases it can hear. Most states, however, have the same general court structures, even though the courts may have different names.

Initially, there are usually several trial level courts which may be referred to as superior courts or courts of general jurisdiction. Each has certain areas of responsibility designated by state law in which it has the authority to hear cases and render decisions.

The larger states have two levels of appeals courts, usually referred to as the state court of appeals and the state supreme court. Many smaller states have only one appeals level court, usually called the Supreme Court. State courts as well as federal courts can construe and apply federal constitutional rights.

The *Lori Case* action, involving the alleged denial of education to a multiply handicapped child, was brought in the Superior Court of Riverside County, California. (Because the case involves federal constitutional rights questions, it could also have been brought in a federal district court.) This case was appealed by the plaintiffs to the California 4th District Court of Appeals and subsequent to that decision, a petition was filed for a hearing in the California Supreme Court.

Which Court System?

The US Constitution and statutes delegate judicial authority between the federal and state governments. In some instances they have concurrent power and plaintiffs have a choice of instituting a particular case in either a federal or state court. The court(s) must also have the subject matter jurisdiction or the authority to hear the case. Whether a court can decide a particular kind of case depends on its constitutional or statutory grant of power.

In order to use federal courts, there must be a statutory basis establishing jurisdiction. The plaintiffs' cause of action must involve a federal question, a question arising under the US Constitution or federal laws or involve diversity, which means involving parties who are citizens of different states. Generally, to attempt to keep the federal courts from becoming clogged, only cases where the cost to the loser in the controversy will be $10,000 or more will be considered. However, for violations of constitutional rights, the rights can usually be valued at the amount necessary for jurisdictional purposes. If these requirements cannot be met, the case must be brought in state court. If a case is brought in a state court and the defendants would rather defend in a federal court (and it is a case where the federal court has jurisdiction) they can ask to have the case removed to a federal court. The decision as to the appropriate court to hear a particular case must be made by the attorneys.

If the educative effect of the litigation is important, the plaintiffs may wish to select a court with the greater promise of visibility. Selection of the location should also consider if there are any local feelings that would more likely work to the advantage or disadvantage of one side or the other. Another factor to be considered is the previous decisions of the respective judges in both the federal and the state courts at both the trial and appeal levels. Practices of the respective courts on freedom of discovery and the awarding of attorneys' fees may be another indicator to be considered. The length of time required to try cases or come to trial in the alternative courts may be another factor to consider.

The Abstention Doctrine

Federal court judges may at their discretion decline to hear certain cases because they believe the cases involve questions for which state courts should be responsible. The usual reason for a judge to refuse to hear a case is because he believes the case involves questions of state law or state policies and that it is more proper for the state judges to make the first decision. For example, a federal judge might decline to hear a case where, although a plaintiff contends a state action is in conflict with a constitutional right, the judge feels that the issue can and should be decided on the basis of state law.

A federal judge might refuse to hear a case because he believes that allowing the case to be brought in federal court would involve needless conflict with a state's administration of its own affairs. A third instance where a federal judge might refuse to hear the case is where a private citizen is seeking answers to difficult questions of state law. Finally a federal judge might decline to hear a case, very simply, because it would serve the convenience of the court to have the case decided elsewhere in state court. For example, in *Reid v. Board of Education of the City of New York*, 453 F. 2d 238 (2d Cir. 1971), a class action brought on behalf of New York City parents who alleged that their brain injured children were not receiving special education in the public school system, the plaintiffs sought a declaratory judgment and preliminary and permanent injunctions to prevent a deprivation under color of state law of their rights protected by the 14th Amendment. In June, 1971, the Judge for the US District Court for the Southern District of New York granted the defendants' motion to dismiss. The court applied the abstention doctrine, reasoning that since there was no charge of deliberate discrimination, and since the city was as concerned as the defendants about the situation, this was a case where the state court could provide an adequate remedy and where resort to the federal courts was unnecessary.

PREPARATION FOR TRIAL

Assuming that the suit being brought is a civil suit in a federal court (state procedures are gen-

Preliminary Considerations

Settlement? Negotiation?

Cause of action?
Legally protected interests of rights?
What kind of relief?
Appropriate defendants?
Private or a class action?
Select attorney?
Build fact record?

Figure 2. Steps of Litigation.

erally similar), there are several preparatory steps explained earlier and indicated in Figure 2 involving the following procedures and documentation which must be considered prior to the formal initiation of the suit.

Complaint and Pleadings

A complaint is a document in which potential plaintiffs inform the court and the defendants that they have a lawsuit for which they are seeking the court's intervention. The pleadings set forth their issue or causes of action and the relief being requested. A suit may be brought under several different and even conflicting theories, hoping to find one or more which the court will recognize and upon which it will grant relief. The term pleading is also used more generally to encompass all of the preliminary steps of complaint-answer-replies that are used to narrow a case down to the basic issues of law and fact.

Answer and Defenses

An answer is the defendant's response to the complaint. The defendant will raise defenses stating why the complaint is without merit or why he is not guilty of or responsible for the charges claimed. Procedural defenses include basic inadequacies in following the rules of the court including lack of subject matter jurisdiction of the person, improper venue, insufficiency of process, insufficiency of services of process, failure to state a claim upon which relief can be granted, failure to join a necessary party (someone who is also responsible for the alleged violation). Defendants can attempt to have a case "thrown out of court" (dismissed) for any of these reasons.

Affirmative defenses are also reasons why the defendant should not be held responsible and may include such defenses as privilege, consent, sovereign immunity, self defense of others, assumption of risk, contributory negligence, duress, and illegality.

Replies, Amendments, and Motions

These are further steps that can be taken in refining the pleadings and responding to allegations or defenses raised by both sides.

It is probably sufficient here to understand that parties are not restricted to their first pleadings and may make changes up until the time the trial begins, and even, after the trial begins, depending on how the case develops, how the defendants respond, and what the plaintiffs are seeking from the court.

Discovery

Discovery is the process by which parties learn about the other side's case including available evidence and the identity of witnesses that are going to be called. In a civil case, parties can "discover" the majority of information relevant to the subject matter of their case (discovery is more limited in a criminal case and limited by rules of criminal procedure), except for privileged material, such as that relating to a doctor-patient relationship. The purpose of discovery in civil actions is to remove the element of surprise and allow both sides to adequately prepare themselves for trial.

There are several different devices which can be used as part of discovery:

1. Deposition—This is a means of obtaining information from anyone who might have knowledge relevant to the preparation of the case. A deposition consists of asking a potential witness to answer oral or written questions under oath in the presence of a court reporter. Attorneys for both sides can be present and can cross examine the witness or raise objections to the questions or testimony.
2. Interrogatory—This is a means of obtaining written answers to questions from any of the parties (any plaintiffs or defendants). The questions are sent to the party to be answered under oath and returned within a specified time. The attorney can assist the party with answers, but because no representatives of the opposing side are present there can be no cross examination.
3. Production of documents or material objects—Either party may request and obtain documents and physical objects relevant to the case which are within the control of the other side. For example, if one side wants to obtain a copy of a psychological evaluation completed on a child and used to deny admittance to a program, he can request the opposite side to produce the document. In addition, *The Freedom of Information Act* requires federal officials to make available, with certain narrow exceptions, public documents and reports upon request by citizens.
4. Physical and mental examinations—With a showing of good cause, a person under cus-

tody or under the legal control of the court may be requested to undergo physical and mental examinations. The examining professional may then testify about the results. The examinations must be related to the matter in controversy. For example, a defendant might be seeking to prove that a child cannot benefit from an education and as a part of the proof will want to have an assessment of the child's intellectual ability.

5. Request for admissions—This is a request that opposing parties admit the truth of certain statements or opinions of fact or of the application of law to the facts so that time will not have to be spent at the trial proving these particular facts. For example, the defendants in the *Wyatt* case stipulated to a number of objective facts concerning the status of Alabama's mental institutions.

There are many considerations in determining which discovery devices to use. For example, depositions are more expensive than interrogatories because the party requesting them has to pay for the time of all the attorneys, the witness, and the court reporter, but they may be of more value because there is opportunity to freely question witnesses which is not possible with interrogatories.

Expert Witnesses

An expert witness is a person with recognized competence in the area in which he is testifying. At trial, the expert will be asked to state his background before providing substantive testimony. The judge and opposing attorney will question him as to his competence and the latter may try to discredit his testimony, either directly or indirectly. Both sides may call expert witnesses. When expert witnesses are brought together in a case, they may have a wide range of background, both in the nature of their formal training, and in their type of applied experience. For example, in the *Mills* case, the experts included:

- A person with a doctorate in the field of special education, who had authored numerous professional publications pertaining to the education of exceptional children, was a consultant to such organizations as the President's Committee on Mental Retardation and the 1965 White House Conference on Education, and had worked for 20 years in the training of teachers and professional leaders in the field of special education.
- An economist with a doctorate in political economy who was the author of several professional publications and a book on the cost benefit analysis of investments in human beings, particularly with regard to the mentally retarded.
- A person with a doctorate in mathematical chemistry who, while not involved in direct services to the retarded had devoted more than 20 years to civic action related to their cause, was a member of national and state commissions and councils whose purpose was to revise and implement legislation concerning the education and other human rights of retarded children and adults, and who was an author of numerous professional publications including articles on mental retardation.

Other Roles Experts May Serve

Experts are vital at two stages of litigation. With regard to actions involving the handicapped, educators, psychologists, psychiatrists, social workers, vocational rehabilitation specialists, and others representative of allied fields may initially be needed to review programs and tour facilities which are the subject of the suit. During these reviews the experts should interview staff and observe conditions from the perspective of their particular specialties and then must be prepared to present their observations and conclusions to plaintiffs, and defendants, their lawyers, and ultimately to the court. For example, expert testimony in the *Wyatt* case was a necessary prelude to the court's finding that conditions at Alabama's institutions were inadequate by any known scientific and medical minimum standards.

Once the court has found that plaintiff's rights are being violated, experts again have a vital role to play in informing the court of generally accepted program or treatment standards. In *PARC*, for example, a number of experts provided a new definition of education for the court stressing that all persons can learn and that learning involves not just academics but the acquisition of skills that enable individuals to better cope with their environment regardless of their environment. This concept was regarded as a key element in the success of the litigation. Implementation of the concept means that for severely mentally retarded children, education might also mean the acquisition of basic self help skills including feeding and toileting. In the *Wyatt* case, plaintiffs, defendants, and amici agreed to a large number of specific standards for adequate treatment, and experts offered testimony explaining to the court why certain specific standards were necessary to insure adequate treatment. Based upon the experts' endorsement, the court ordered the recommended standards to be implemented as constitutionally required minimums.

THE TRIAL

Parties have a right to a trial by jury except when they are seeking injunctive relief. Even with the right to a jury, their attorney must demand a jury trial or the judge will automatically decide the case. A jury can only determine questions of fact, such as who is telling the truth, while the judge always determines questions of law such as, what must be proved to indicate that someone's right to an education has been violated. If there is no jury, the judge determines questions of both law and fact.

Steps of the Trial

Usually, the plaintiff's attorney will present his *evidence* first. The defendant's attorney can cross examine the plaintiff's witness. Either side may object to any evidence or testimony if they do not believe it should be admitted. The judge will rule on whether the evidence in question is admissible based upon such factors as its relevance, trustworthiness, prejudice and prior appellate decisions on the issue.

When the plaintiff's attorney has presented all of his evidence, he will rest his case. At that time, the defendant's attorney may make a *motion for a directed verdict* or a *motion for summary judgment* which means that he is asking the court to decide that as a matter of law the plaintiff has failed to prove the facts necessary to establish the case, or that based upon the facts established by the plaintiffs, the defendants must win as a matter of law. The court can then grant the motion ending the trial or continue with the defendant's attorney presenting his evidence followed by the plaintiff's attorney's cross examination and the raising of appropriate objections. When the defense rests, either side may move for a directed verdict. If the judge denies the motion, he may then weigh the evidence of each side and immediately decide the case and make a decision or he may delay his decision until after he has had time to study the issues involved. He may ask each side for *trial briefs* stating each side's position on disputed points of law which are areas where courts have disagreed or have not actually decided on a particular point under these circumstances.

Usually, attorneys for each side will present oral arguments emphasizing why the case should be decided in their favor and explaining what relief they are seeking.

The Verdict

After the verdict is reached, the "winner" will make a motion for a judgment on the verdict and the "loser" will make a motion for a judgment notwithstanding the verdict such as asking the court to decide for the losing side even though they lost the jury verdict. The judge will issue a judgment which sets out the relief to be granted to the winning side. For the loser, there are still other steps, filing a *motion for a new trial*, and if this is refused, a *motion for appeal.*

Appeal

The losing side can appeal if they believe the decision was decided incorrectly as a matter of law or that the judge made procedural errors during the trial, such as improperly admitting or excluding evidence. The losing party must have raised objections to such errors at the time they occurred or an appeal will not be permitted.

An appeal is not another trial since there will not be another chance to call additional witnesses or to present additional evidence unless some new material and relevant evidence which could not have been uncovered earlier has come to light since the conclusion of the trial. Pursuit to an appeals court asks the court to review the record of the trial court proceedings, which consists of all the written materials from the trial. In addition, both sides will submit a brief which sets out the errors allegedly made by the trial judge with appropriate supporting legal arguments and cases. Counsel for each side will usually also present oral arguments before the judges, summarizing their cases as well as answering questions.

The appeals court judges seek to determine whether the trial judge properly stated and applied the law in his rulings and/or charge to the jury. They may also review fact determinations by the jury. If the appeals judges find an error, they will reverse the trial judge and either grant some or all of the relief being sought, or remand (send back) the case to the trial court for a retrial on some or all of the issues. A judgment will not be set aside unless the error affected substantial or material rights of the parties. If the appeals judges support the ruling of the trial court, they will affirm the trial court's decision.

The loser of the first appeal may be able to appeal again to the next highest court. In states where there are two appeals levels, the highest court may have great discretion in deciding which cases it will review and may not have to review every case, except those involving constitutional questions. After the highest state court, or the appropriate US court of appeals if it is a federal case, it may be possible to obtain review by the US Supreme Court; but again, the Supreme Court need only accept a limited number of cases by appeal. Most of the cases which it hears occur through the granting of a writ of certiorari which is a request that the court use its discretionary powers to hear the case. It may also hear a case by certification if a court of appeals requests instructions on a question of law. Even though a party believes he has a case that was decided incorrectly, the Supreme Court is not required to review it and will usually only choose to hear those cases involving issues they deem important. Four of the nine Justices must decide to hear a cert (writ of certiorari) case before it is brought before the entire court. The entire process is reviewed in Figure 3.

Significance of Decisions

A precedent is a rule to guide or support other judges in deciding future cases seeking similar or analogous decisions. For example, in the *Mills* case, the judge based his decision that handicapped children have a constitutional right to public education on due process and equal protection of the laws. In support of his decision, the judge cited several famous educational decisions as precedents, including *Brown v. Board of Education*, the 1954 Supreme Court decision outlawing segregated schools and the *Hobson v. Hansen*, 269 F.Supp. 401 (D.C.D.C. 1967), decision by Judge J. Skelly Wright outlawing the so-called "track system" in the District of Columbia.

As a precedent, a decision will have most value in the jurisdiction where it is handed

Choose proper court	State or federal court Jurisdiction Procedures, competence, fairness	Settlement? Negotiation?
Preparation	Complaint and pleadings Answers and defenses Replies, amendments, motions Discovery Preliminary hearing Pretrial conference and order	Settlement? Negotiation?
Trial	Judge or jury Plaintiff presents evidence; defendant cross examines Defendant presents evidence; plaintiff cross examines Oral arguments Instruction to the jury Verdict—motion—judgment—	Settlement? Negotiation?
Appeals	Motions Briefs Oral arguments Judgment	Settlement? Negotiation?

Figure 3. Litigation process.

down. For example, courts in Alabama are more likely to follow prior Alabama decisions than prior New York decisions on the same issue. Courts in one area of the country are more likely to follow decisions by other courts in their region so some decisions have a regional impact.

Decisions in certain state courts, certain federal district courts, or certain appeals courts are considered more influential than others and may be considered more heavily by some judges because of the recognized competence or reputation of the judges who made the decisions.

A decision from a circuit court of appeals is of even greater value than one from a district court. A decision by the US Supreme Court establishes the greatest possible precedent because the decisions of the Supreme Court are binding across the country and usually all state courts when hearing cases involving federal law conform their decisions to Supreme Court rulings.

A word of caution should be interjected, however, because in interpreting and applying Supreme Court decisions to different facts, lower courts may still resolve similar cases differently, until other Supreme Court rulings occur that clarify or strengthen the position. This points out that there is really little absolute or "apolitical" law that remains immutable as time passes, as public policies change and interests of society shift.

The importance of a decision depends on the court that issued it, whether the decision is published and available, whether it is being appealed, and the quality of the reasoning behind the decision. A decision can be more or less persuasive depending on the level of the court and its jurisdiction. A decision from a state trial court or a federal district court has less weight or influence than a decision from a state or federal appeals court or a state supreme court. A decision may also have spillover value and contribute to change. For example, if the *Wyatt* case had been a private action, the decision would have in theory only directly affected Ricky Wyatt and the defendants would have been legally bound to change their actions in relation only to him. By this decision, however, the defendants might have been influenced to change their actions towards all of the residents of the institution. If the *Wyatt* case had been a class action which only joined the residents at one hospital in Alabama, the defendants would only have been legally bound to change their actions and improve conditions at that single facility. However, the defendants and other persons with state wide responsibilities who became aware of the court's decision might on the basis of the ruling improve the situation in all the state institutions, knowing that other residents could bring similar suits which would again involve the defendants in costly and lengthy litigation leading to the same conclusion.

Litigation Expenses

There are three main costs: attorneys' fees, litigation expenses, and court costs.

Different attorneys charge different fees, depending upon the nature of the case, the time expended in the preparation and trial of the case, the attorneys' amount of experience and reputation, and the ability of a client to pay. (A manual explaining attorneys' fees is available from Mary Frances Deifner, Director, Attorneys' Fees Project, PO 419, Charleston, South Carolina 29402.) Attorneys' fees may also vary considerably from one geographic region to another, so it is not possible to cite exact dollar figures. Generally, however, attorneys' fees are expensive. Average hourly costs generally range from $20 to $100, and $50 an hour is not uncommon. If plaintiffs win the case, there is a chance that they will be awarded court costs, but it is more difficult to recover attorneys' fees, except where a statute provides for their recovery or where the court uses its discretion to award the fees.

Recovering attorneys' fees is an area of expanding law, however, particularly in cases which are won by public interest groups and which demonstrate benefits that extend to members of society beyond the plaintiffs. For example, in the *Wyatt* case, the court found that by successfully prosecuting the suit, plaintiffs benefitted not only the present residents of the two state hospitals and school for the mentally retarded, but all others who might in the future be confined to those institutions. As the court stated, "veritably, it is no overstatement to assert that all of Alabama's citizens have profited and will continue to profit from this litigation. So prevalent are mental disorders in our society that no family is immune from their perilous incursion. Consequently, the availability of institutions capable of dealing successfully with such disorders is essential, and, of course, in the best interest of all Alabamians." The court ordered that the defendant Alabama Mental Health Board pay the expenses and plaintiff's attorneys' fees.

In attempting to determine what was a reasonable fee under the circumstances, the court referred to the *Criminal Justice Act* which provides compensation to attorneys appointed to represent indigent defendants. The Act's legislative history makes it clear that although the amount provided, $20 per out of court hour and $30 per in court hour, is below normal levels of compensation in legal practice, it nevertheless is considered a reasonable basis upon which lawyers can carry out their professional responsibility without either personal profiteering or undue financial sacrifice. The court applied the $20 and $30 fee schedule in *Wyatt*, and reasoned that the attorneys embarked upon the case with knowledge that their named clients were unable to pay them and were motivated not by desire for profit, but public spirit and a sense of duty. A total of $36,754 was awarded by the court to cover attorneys' fees and expenses.

It may also be possible to involve a public interest law or the public defender service or attorneys from a local legal aid office. Profit making public interest firms usually charge very low fees. In addition many regular law firms also devote a portion of their time to pro bono (free) work, work in the public interest without compensation.

Although most attorneys' fees are computed on an hourly basis as indicated above, some attorneys will charge a flat fee, a lump sum for conducting that suit through one or more levels. Those bringing a tort action can frequently acquire an attorney who will handle the suit on a contingency fee basis. If the case is won the attorney will receive as his fee a percentage of the amount awarded by the court. It may be one third or one half of the award. If the case is lost, he will receive nothing. Understandably, attorneys will probably not become involved on a contingency basis with cases which they feel are hopeless.

In addition to attorneys' fees, litigation expenses include payment for such items as necessary discovery devices—e.g., the costs of taking depositions and giving physical examinations, travel expenses for lawyers and expert witnesses, filing fees, and duplicating expenses.

Court Costs

Court costs are fees and charges required by laws of the various jurisdictions for the time of the courts and some of the officers of the court. Court costs are normally awarded as a matter of course to the prevailing (winning) party and paid by the losers.

Litigation should not be pursued on the assumption that there will be no financial responsibility in bringing the suit. Neither, however, should the possibility of litigation be rejected because it appears financially out of the question. If an individual or organization becomes a party in a suit involving exceptional children or handicapped adults, the resource groups listed earlier could be of assistance.

AFTER LITIGATION

Declaration by a court that handicapped persons have a right to education, treatment, or proper classification merely signals that the hard work of implementation still lies ahead. It may also conclude only the first round of litigation since if required implementation does not occur, the parties could once again be in court.

Factors Complicating Implementation

Complicating the implementation of a court order is the basic fact that in the types of litigation discussed here, victories for handicapped persons, particularly if class actions, often require action on the part of the public agencies and employees who have been publicly defeated. Even when it is stressed that litigation is not necessarily a personal attack, some lawyers say that there is no such thing as a friendly lawsuit.

Establishment by the court of the fact that certain individual rights are protected by the Constitution or that specific actions must be undertaken to observe those rights does not in any way guarantee that the needed corrective action will occur. To bring about action requires, at a minimum, changes in established human behavior patterns at possibly a number of governmental levels and agencies. The consent agreement achieved in *PARC* involved the education agencies at the state, intermediate, and local levels as well as the state agency administering state institutions and other non school programs for the mentally retarded. Thus, to implement the order, behavior had to be changed in state and local policy making bodies such as boards of education; administrators, including school and institution superintendents as well as individual building principals; and finally the whole range of staff from dieticians to teachers, to therapists, custodians and bus drivers.

It is likely that implementation of victorious class actions of the nature described here will require additional resources. In *Wyatt*, the court required the immediate hiring of 300 ward attendants to insure the physical well being of institutionalized persons. Data collected in one intermediate district in Pennsylvania since the implementation of the *PARC* decree as related by Richard Sherr in a presentation at Dover, Delaware, March 23, 1973, indicated that costs for the total program of special education have increased 40%.

Another problem concerning implementation is that after the conclusion of the litigation, very few of the people and often only those in the highest levels of responsibility become familiar with the decision and its meaning. The majority of persons involved in implementation learn about the decision by rumor or are provided with "pieces" of the order that are particularly relevant to their job responsibilities. Equally significant is that in some situations where government is required to alter its practices, officials at the highest levels never publicly announce or at least acknowledge past injustices or approval of the decision or, at best, the commitment of his office and administration to implementation. The latter step was taken by Governor Shapp of Pennsylvania which put the entire state on notice that implementation of the *PARC* consent agreement was to occur.

Requirements for Achieving Implementation

Often two extremes of response occur in the aftermath of a decision by the victorious side. One response is based on the misperception that total victory has been achieved, the job is concluded and that the time has come for glorious rejoicing. The other extreme reflects a more cautious view and focuses on vindictively monitoring every movement of the defeated side for the purpose of reporting to the court, the public, and the victorious constituency. Although monitoring is clearly required, it must not be done with malice, nor must the victorious stand aside harping and offer no assistance to those now involved in making changes. Clearly, positive change requires the wedding of both sides in the litigation.

The discussion of the problems above points the way for the identification of solutions. First and foremost, however, is that to achieve effective implementation, the public, and particularly that portion of the public that makes or has impact on the making of policy decisions, must be educated as to the issues leading to the litigation, the results, and the requirements to bring about change. If, for example, handicapped children, who previously were excluded from school, are to profit from their newly won right to enroll in a school where there may be nonhandicapped children, the quality of that experience for that child may well depend on the information related to and the attitudes of the parents of the nonhandicapped children.

Public education must involve the use of mass media, prominently displayed posters and any other communication devices that will effectively deliver the message. In *Mills*, the court required the insertion of quarterly advertisements in Washington's three major daily newspapers announcing that all District of Columbia children have a right to a free publicly supported education.

Change from past behavior to new behavior requires the infusion of new ideas and of course extensive work. Many of the new ideas can result from a merging of resources of the previous adversaries. Persons outside government can effectively work in an advisory role in committees with agency representatives. Often the nongovernmental resource people are involved with private agencies such as parent groups including the Association for Children with Learning Disabilities, and the National Association for Retarded Citizens and professional groups such as The Council for Exceptional Children, that can be of great assistance in disseminating information as well as other tasks.

Involvement by the winner of the suit with the loser also builds the base for effective monitoring of the steps being taken for implementation. In addition, monitoring in this fashion will make clear to those outside the points of responsibility the needs that exist within to facilitate the implementation process and will allow for the development of exterior strategies and activities to meet those needs.

It must be recognized that the implementation process will not always occur in smooth fashion and that old issues and differences of opinion will occur. This is the reality. The resolve of these disputes should, if possible, occur without the intervention of the court. This function can be effectively discharged by masters, if appointed by the court. In many judicial orders, requirements for reporting to the court on progress made may serve as a means of resolving these issues.

The point cannot be made strongly enough that a judicial decision may not be worth the paper on which it is written, if it is not implemented. The delays in integrating schools for some 20 years after the *Brown v. Board of Education* decision in 1954, serves as an example of the difficulties in implementing a court's decree even when it is issued by the highest court in the land.

The Relationship Between Litigation and Other Avenues for Legal Change

Ultimately, the remedy of injustice to the handicapped will occur because increased public awareness and concern will lead to different attitudes accompanied by alterations in fiscal priorities required to establish needed programs and services. To this end, litigation, because of its appeal to the media, has and can create an atmosphere calling for reform.

The right to education movement for handicapped children that has been occurring for the past few years has produced a climate in which high level government officials have publicly committed their resources to remedy the injustice. Governor Christopher Bond, on a January 21, 1973 edition of television's *Issues and Answers*, indicated, when asked about Missouri's priorities, that the first is state support for special education. Specifically, he said "Many of our special children in Missouri don't have access to special education services, and I think this is morally wrong, and I think maybe the children may even have a constitutional right to this education, so we want to put many more dollars into that." Edwin Martin, Associate Commissioner of Education for the Handicapped in the US Office of Education, wrote in 1972 that "in developing the rationale for federal support of education of handicapped children, we have increasingly emphasized the intrinsic right of each child to an appropriate education."

Another benefit realized from the right to education movement has been in the area of state and federal legislation. On the federal level, a number of bills have been introduced during recent sessions of the Congress. The passage in 1974 of P.L. 93-380, the Education Amendments of 1974, put into law many of the same "rights" guarantees that were initially achieved in the litigation. Now the passage of S.6, P.L. 94-142, established the potential for the states to receive greatly expanded financial assistance to improve and expand their education programs for handicapped children.

In addition, since the beginning of the litigation effort, a vast number of bills have been introduced and passed in the states. Many of these have also focused on achieving the right to education mandate for all handicapped children. In fact, all but two states now have mandatory laws regarding the education of handicapped children. Totally new and comprehensive legislation providing for the education of the handicapped was passed during that time in Massachusetts and Tennessee that has as basic policy that all children were entitled to a free public education.

Other effects have been seen in recent attorney generals' rulings. For example, in Delaware, the attorney general issued an opinion on March 26, 1973, that declares, on the basis of *PARC* and *Mills*, that statutory limitations on the growth of some special education programs are unconstitutional.

Because the right to treatment movement has not progressed at the same rate, less official evidence is available of change. Yet, it is known that administrative practices have changed and that because of the visibility given this issue, fiscal alterations can be expected to some degree in the future that will further improve practices.

Finally, it must be emphasized again that litigation by itself is not a solution to a problem. It can, however, clarify the problem and establish multiple bases for instituting change. All avenues of the law, legislation, regulations, attorney general opinions, and litigation can and must be brought to bear on altering the present status of the handicapped in the United States. The guiding principle must be that in the perspective of a society characterized by a good deal of commotion over numerous causes, only a few "successes" ever really stand out; these are situations in which the plaintiffs and their supporters have never stopped asking, "Now have we won?"

Section IV:

Understanding the Political Process

Section Editor

Martin L. LaVor

Overview

☐ The majority of individuals in our society and perhaps all societies are apolitical; that is, they do not participate in political activities. Dahl (1963) gives three reasons for such behavior:

1. "An individual is unlikely to get involved in politics if he places a low valuation on the rewards to be gained from political involvement relative to the rewards expected from other kinds of human activity."
2. "An individual is unlikely to get involved in politics if he thinks that the probability of his influencing the outcome of events or changing the balance of rewards by means of his political involvement is low."
3. "An individual is unlikely to get involved in politics if he believes that the outcome will be relatively satisfactory to him without his involvement."

The purposes of this section are first to demonstrate to individuals concerned about exceptional children that politics affects in one way or another almost everything that happens to exceptional children, that individually or together people can affect political events, and that unless more people become involved it may be doubtful that the goals of educating all exceptional children will be achieved. The second purpose is to provide those already active or becoming active in the political process a basic understanding of the processes, procedures, plans, and games necessary to effect change.

To some, the realities portrayed by the authors of this section may make efforts to effect change look overwhelming, frustrating, time consuming, and perhaps futile. They may be, but at the same time, the authors all share optimism that individuals and groups can effect change and that such activities are among the most rewarding of human endeavors. The case study chapters by Harmon ("Kentucky Right to Education Litigation") and Riley ("Ins and Outs of Legislative Reform: Vermont's S.98") have all the thrills of a good mystery. The reader will share the agonies of the underdogs as they challenge the system and share their joy in victory.

Weintraub ("Politics—The Name of the Game") and Jones ("The Professional Educator and the Political Process") discuss in personal terms the political processes of effecting change. The reader will note that the processes discussed are basically the same as those we all use in our personal lives but that the techniques and arenas are different.

The chapters by LaVor ("You Want to Change the System—But Where Do You Begin" and "Time and Circumstances") provide the reader with the cold realities required to understand any governmental system you may need to tackle. Finally, in "Martin Hatches An Egg," La Vor satirically ties it all together.

It is hoped that the reader, after completing this section, will conclude that successful change agents are those who know how to understand problems better, attack them incrementally, work in varied arenas, know the value of timely compromise, and understand the players as well as the system. Such change agents will truly be able to make an impact.

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MARTIN L. LA VOR

You Want to Change the System—But Where Do You Begin?

☐ The next time you think the federal, state, or local governments or your local school should start a new program in an area of special concern to you, take some time to investigate what is already authorized, funded, and operating. Programs and legislative authorities already exist in almost every conceivable area, but all too often the general public is unaware of them. There are so many programs available to meet the varied needs of special interests that they frequently overlap or duplicate each other.

Let us assume for a moment that you have thoroughly investigated the matter, and you are determined to try to start a new program or change an existing one. To begin, choices and decisions will have to be made. To approach decision making for desired change, the manner in which funds are committed to a particular service or area of interest must be considered. Regardless of how much money is available or the approach taken to satisfy a particular program strategy, there are those who will question whether the funds are adequate. At the same time, others will charge that the federal, state, or local government or local school is already spending too much money and really has no business in this area in the first place. *Your attitudes and the responses to them reflect personal values, judgments, backgrounds, and political and philosophical outlooks.*

Ultimately, however, any decision boils down to how one makes choices, which involves many considerations. *Decisions in the federal, state, or local bureaucracy, or any other place for that matter, are not made in a vacuum and must be considered in the context of what exists, what is available, and what the limitations are as well as other constraints placed upon the decision makers.*

AN EXERCISE IN DECISION MAKING

It is easy to criticize the President, members of the Congress, a governor, a mayor, a superintendent of schools, or other officials about specific program choices or budgetary decisions. But assume for a moment that *you* were in the position of making recommendations to these decision makers. Assume that the President asked you to be his "number one advisor for children" in the federal government. The President directs you to develop a program to serve "as many children as possible." He does not mention day care, child development, preschool, age limitations, exceptional persons, or funding limitations; he will allow you to do anything you want to do as long as you reach the objective. He asks for your best advice and judgment. What would you recommend to the President of the United States?

(NOTE: This identical exercise can be used in virtually any context and/or subject area and can be altered to the federal, state, or local level. It need only be adjusted for scope, content, and limitations.)

Take a few minutes and jot down the major ideas that you have. Take another minute and list the five most important items which you would recommend. In addition, make an estimate as to how much you think your proposals will cost.

During the last few minutes the adrenalin probably flowed as grand ideas raced through your mind. Of course, this exercise is unrealistic, being nothing more than a fling in fantasyland—it is highly unlikely that any President would ever make such a request. In all probability, even if a President *were* disposed to make a large commitment of funds to services for children, he might say, "Because there is a

$68 billion deficit this year, I must place some budgetary constraints on you." And he might advise you that "you have a total of $1 billion in new (heretofore uncommitted) funds to fulfill your assignment."

At this point you should write your goals with the new restrictions.

If this situation were real, you would have limitations and restrictions before you had an opportunity to share your original ideas with the President. *Every federal, state, and local agency, every program, every office or employee in each of those agencies has constraints; all are more severe and rigid than those you have just been given.*

Therefore, it is highly unlikely that you would have been given an assignment in which you had $1 billion in *new* money to work with. If it actually happened, it would be rare indeed. In all probability, if this assignment were given, there would be more restrictions, as the President would probably add, "Oh, by the way, we have several child care service programs already in place such as Headstart, the Social Security Act Child Care Provisions, the Elementary and Secondary Education Act, etc." (On July 15, 1975, Caspar Weinberger, then Secretary of the Department of Health, Education, and Welfare (HEW), testified before the Education and Labor Committee of the US House of Representatives that "in fiscal year 1974, more than $13.2 billion of the Department's 1974 budget was devoted to some 200 programs either directly or indirectly impacting on the health, education, or welfare of our children.")

The President might ask how should we rationalize those programs already in place? Should we abolish some or all of them, start a new one, or expand the existing programs? It is clear that a decision to do something that appears to be necessary for children cannot be made in isolation. *All decisions must be made to accommodate a range of political, economic, and philosophical considerations.*

THE COMPLEXITY OF THE SYSTEM

The following is just one example of how complex this can be. A study by the US General Accounting Office (GAO) in January 1972, entitled *An Evaluation of the Child Care Activities in the District of Columbia,* best illustrated how complex and complicated programs and delivery systems can be. The study made interesting reading, but most striking were the charts, which graphically presented the evolution of programs serving children and the confusing network of organizations and services established to carry them out. (It must be noted that, while the study was centered in the District of Columbia, the GAO indicated that similar charts could be drawn for every major city in the country.)

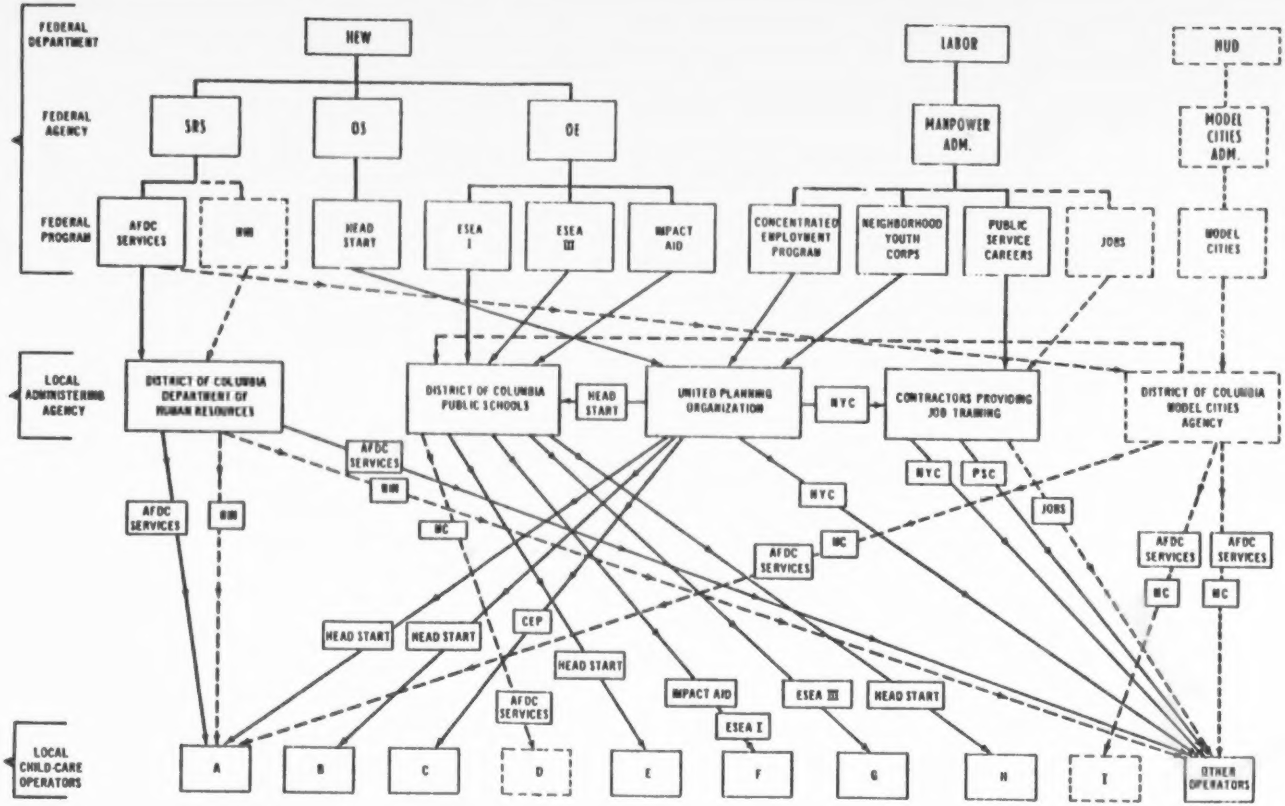
As Figure 1 (taken from the GAO report) illustrates, *eleven* federal programs fund child care activities: Aid for Families with Dependent Children (AFDC); Work Incentive (WIN); Headstart; Elementary and Secondary Education Act—Titles I and II (ESEA-I, ESEA-II); Impact Aid; Concentrated Employment Program; Neighborhood Youth Corps; Public Service Careers; JOBS; and Model Cities. The eleven programs operate through *three* federal departments: Health, Education, and Welfare (HEW); Labor; and Housing and Urban Development (HUD). They operate through *five* federal agencies: Social and Rehabilitation Service; Office of the Secretary of HEW; Office of Education; Manpower Administration—Department of Labor; Model Cities Administration. And they are administered by *five* local agencies: District of Columbia Department of Human Resources; District of Columbia Public Schools; United Planning Organization; Contractors Providing Job Training; District of Columbia Model Cities Agency. These local agencies, in turn, subcontract to an unlimited number of local child care operators.

The Tough Decisions

Assuming that you have $1 billion in new funds to spend and you want to establish a *new* program, you must recognize that with $1 billion it is impossible to serve every child in America. At this point you must make your first choice: Which *children* should be served? After that you must consider the *kinds of services* that you will provide to these children. Will the services emphasize *quantity* or *quality,* or will you try to combine both? In order to answer these questions, you must first make other judgments and decisions.

On the matter of *quantity*—assume that you want to reach as many children as possible with $1 billion. How can you best do it? First, you must choose which children to serve. It is not enough to just say you will serve as many as possible; specific groups must be selected. Should you put your emphasis on serving *all* children, or will you restrict the number who are eligible?

Figure 1. Child care activities in the District of Columbia. (From January 1972 GAO report).


FEDERAL DEPARTMENT
FEDERAL AGENCY
FEDERAL PROGRAM
LOCAL ADMINISTERING AGENCY
LOCAL CHILD-CARE OPERATORS
HEW
LABOR
HUD
SRS
OS
OE
MANPOWER ADM.
MODEL CITIES ADM.
AFDC SERVICES
WIN
HEAD START
ESEA I
ESEA III
IMPACT AID
CONCENTRATED EMPLOYMENT PROGRAM
NEIGHBORHOOD YOUTH CORPS
PUBLIC SERVICE CAREERS
JOBS
MODEL CITIES
DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN RESOURCES
DISTRICT OF COLUMBIA PUBLIC SCHOOLS
HEAD START
UNITED PLANNING ORGANIZATION
NYC
CONTRACTORS PROVIDING JOB TRAINING
DISTRICT OF COLUMBIA MODEL CITIES AGENCY
AFDC SERVICES
WIN
AFDC SERVICES
WIN
MC
NYC
NYC
PSC
JOBS
AFDC SERVICES
MC
AFDC SERVICES
AFDC SERVICES
MC
MC
HEAD START
HEAD START
CEP
HEAD START
AFDC SERVICES
IMPACT AID
ESEA III
HEAD START
ESEA I
A
B
C
D
E
F
G
H
I
OTHER OPERATORS

Should only poor children be served? Should services be provided for the "near-poor"? Should children of nonpoor parents be allowed to participate in these programs? If yes, under what conditions? Does every child who comes from a family below the poverty level require child care services? Should children with physical or mental disabilities be served?

Now the task is not as easy as it was when you were simply jotting down your ideas a few minutes ago. You, as the President's advisor, must make value judgments and choices that are difficult and unpleasant. The fact is that *you cannot do everything that you would like to do or think is necessary.* Also, after you make your choices, you must realize that many people will not agree with them. Will they be politically acceptable?

Up to this point you only considered the question of which and how many children you would serve, but what about *quality?* Assuming that no one intentionally establishes an inferior program, how will you determine what quality is? To start, you can begin by examining several issues.

The Headstart program is the largest model available, with the greatest amount of funds. Should the Headstart program and all of its supplementary services, professional personnel, methods, and techniques be used as a yardstick to measure quality? Are all of those services and all of those people really necessary, and do they, in themselves, constitute or guarantee quality? If Headstart is of high quality, why not simply expand that program rather than start a new one? Are social workers, psychologists, nutritionists, and other specialists necessary to quality? Should educational enrichment be a mandatory part of the program? Should new facilities be constructed, or should existing buildings be used? Should there be any restrictions placed on financing in this area? Are professionals necessary to operate these programs or can paraprofessionals or nonprofessionals do the job as well? What is the ideal staff-child ratio? What is this based on? Should parents be involved in the programs? Should they serve as paid staff or as volunteers? How many meals or snacks should be served? How many hours a day should centers be open? What type of program does a child really need in order to achieve a high level educational experience?

This type of questioning can be adapted to virtually any given area. For example, if a school system wished to establish or modify special education programs for the educable mentally retarded, many of these same questions could be asked. In addition, questions relating to specific class size could be included, such as, What should the maximum class size be? In many states, 15 is the maximum class size, but why not 10, 12, 18, or even 20? Could one teacher with an aide handle and adequately teach 20 to 25 children? Should all handicapped children be sent to a single school, or should they be included in classrooms in regular schools? What would the cost of transportation be in either case? What special services over and above those normally given in a special class should be provided?

Expense of the Programs

When you begin to answer these and many other questions and begin making all of these judgments, remember that *every time you make a decision it may cost money!*

What do children really need in order to achieve a maximum educational experience? The answers to that do not exist at the present time. There are many ideas and suppositions. What is known is that quality programs, or what are considered to be quality programs by today's standards, are very expensive.

For example, the Senate Committee on Finance conducted an extensive study of the entire issue of child care and in October 1974 put out a document entitled *Child Care—Data and Materials.* The report contained the following information regarding child care costs:

First, the ABT associates conducted a study under contract of the Office of Economic Opportunity. This study involved a description and analysis of 20 child care centers and systems that were considered by the study's authors to be "among the better centers and systems of their kind in the country." The report, "A Study in Child Care 1970–71," indicates an annual cost of $2,349 per child for a center with an average daily attendance of 25 children; $2,223 for a 50 child center; and $2,189 for a 75 child center. It should be noted that these figures are on the basis of average daily attendance (the HEW figures presented above are not). The average cost per enrollee would be somewhat less in the ABT study than the cost figures based on average daily attendance.

Second, the Westinghouse Learning Corporation, also under contract with the Office of Economic Opportunity, made a study in 1970 aimed at describing what actually exists and is being used for full-day care. A survey was made of 289 centers, 577 parent users, and an area probability sample of 134 day care homes and 1,812 families which were potential users of child care. The survey showed a cost of $324 a year for what was defined as custodial care, $540 a year for educational, and $1,368 for developmental care.

Third, in 1972 the Inner City Fund, under contract with the Office of Child Development, prepared a study of costs of child care designed to meet a new set of standards then being considered to replace the 1968 Federal Interagency Day Care Requirements. These standards, which were never promulgated, varied from the earlier standards in the area of child-staff ratios, in general allowing more children per staff member. Using this data, Vivian Lewis calculated that "the mean annual costs of center day care per child (in the 31 largest US cities) dictated by the 1972 standards amount to a substantial $1,544 for children aged 3 to 4 ½ years and $1,311 for children aged 4 ½ to 6." The figures cited above do not reflect what parents themselves are actually paying for care of their children, or what is being paid under existing federal programs.

Fourth, the reported cost of care provided under federal programs appears to vary widely, both according to the program under which it is provided and according to the state in which it is delivered. The average annual cost per child of care provided under the AFDC social services program, including both federal and state costs, was $1,777 in 1974 on a nationwide basis. However, according to estimates developed in a special HEW survey in 1973, the federal amounts ranged from about $240 per child in Wyoming to slightly more than $3,000 in Pennsylvania. In these cases the quality and amount of care provided must have been different. The costs of full year, full day Headstart programs also show great variations. In 1973 the national average federal per child cost was $1,041. Statistics from the Office of Child Development show amounts of $69 in Vermont, $180 in Colorado, $381 in Utah—compared with $2,222 in New York, $2,104 in California, and $1,994 in the District of Columbia.

Since quality programs are so expensive, one of the first questions that you must answer in setting up a program is whether you should use the $1 billion and serve 500,000 children (based on an average cost of $2,000), or provide fewer services, less personnel, lower fringe benefits, and serve 300,000 more children?

THIS EXERCISE TURNED INTO REALITY: H. R. 1

Earlier there was a suggestion that this exercise was not realistic and that it was highly unlikely that it would ever take place; but in early 1970, such an exercise actually did take place when the President was designing legislation to reform the welfare system. A bill was introduced in the Congress, which became known as "H.R. 1," and was designed to take women off the welfare roles and put them to work.

As a small part of that bill, child care services for children of these women were provided in order to facilitate their going to work. At the time, many advocates of universal child development services argued that the services provided under H.R. 1 would not be of sufficient scope or depth to really affect children and influence their development. Since the average cost per child was projected to be only $800 per year, this charge and many others were raised, but the fact remained that the Administration had made a commitment to spend $535 million in new funds; this was almost as much as the $630 million federal expenditure for all child care programs during fiscal year 1972.

It must be recognized that there is a difference between a commitment a President (or other executive) and his Administration might make regarding their overall policy and goals and the judgments made by advocates of specific program areas. A President (or other executive) bases judgments on what he believes to be the best way to meet national, state, and local needs as well as on what is politically advantageous. Legislation and programs developed for a specific area do not amass by themselves, but are generally part of a desire to satisfy pressures as well as perceived needs. The Nixon Administration's overall goal was to reduce the welfare rolls, and in this perspective, if children benefited, it would have been an added bonus. Welfare reform was never intended to have serving children as a priority.

Legislation designed specifically for children, on the other hand (discussed in the chapter in this book entitled, "Timing and Circumstances") was initiated by the Congress at the same time as H.R. 1 was being developed by the President. The framers of the proposed Comprehensive Child Development Act made judgments as to needs *they* saw in this area and produced a bill they felt was the best way to meet those needs.

IMPORTANCE OF UNDERSTANDING FISCAL RESTRAINTS

Every year legislation is passed that is designed to meet specific needs, but when there are budget deficits, hard choices must be made as to how to allocate funds. These choices are always difficult, and if money is not placed in the area you happen to consider important, the chances are you will not be satisfied with them.

So to put the matter in perspective, one can argue all day long as to whether decisions of a President, a governor, a mayor, a Congress, an Administration, a legislature, a school board, or a department head are good or bad. It is easy to say that when the decisions are consistent with your goals and objectives they are right and that when they are different from your desires they are wrong. These descriptions are simplistic and neither is accurate. It does and will continue, however, to make good (and often partisan) politics.

Attempting to effect change is difficult, frustrating, time consuming and rewarding. Substantial change rarely occurs immediately. The most successful change agents are those who move incrementally taking small pieces each time. Activists who want "total change at once" are rarely successful. The patient, fully prepared individuals who know the value of timely compromise and understand the players as well as the system are those who truly make an impact.

Every day each of us sees problems and unmet needs we believe should receive some attention. This is true in our personal life as well as with federal, state, and local governments, school boards, or for the teacher in a classroom. There are areas that should receive more attention than dollars, but when considering priorities, it is essential to first understand that to make changes one must be thoroughly aware of what it is that one seeks to change. Before a massive expenditure of dollars can be advocated, it is important to be knowledgeable about *how* existing dollars are spent, the *possibilities* for changing budget directions and the *net effect* of such changes.

THE POLITICS OF THE BUDGET

In attempting to affect change the route most often used is to secure more money. Money for programs comes from budgets, and regardless of whether the change sought is on the federal, state, or local level, the complexities of altering a budget are similar. To help gain an understanding of the realities of the budget process, plus insights as to how and why they work as they do, the following excerpts from *The Politics of the Budgetary Process* (1964), written by Aaron Wildavsky, will be helpful:

> *Budgeting is incremental.* The largest determining factor of the size and content of this year's budget is last year's budget. Most of the budget is a product of previous decisions. As former Budget Director Stans put it, 'There is very little flexibility in the budget because of the tremendous number of commitments that are made years ahead.' The budget may be conceived of as an iceberg with by far the largest part below the surface, outside the control of anyone. Many items in the budget are standard and are simply reenacted every year unless there is a special reason to challenge them. Long-range commitments have been made and this year's share is scooped out of the total and included as part of the annual budget. There are mandatory programs such as price supports or veterans' pensions whose expenses must be met . . . . There are programs which appear to be satisfactory and which no one challenges any more. Powerful political support makes the inclusion of other activities inevitable.
>
> Budgeting is incremental, not comprehensive. The beginning of wisdom about an agency budget is that it is almost never actively reviewed as a whole every year in the sense of reconsidering the value of all existing programs as compared to all possible alternatives. Instead, it is based on last year's budget with special attention given to a narrow range of increases or decreases.
>
> . . . The political realities, budget officials say, restrict their attention to items they can do something about—a few new programs and possible cuts in a few old ones.
>
> Time and again participants in the budgetary process speak of having arrived at an estimate of what was the 'fair share' of the total budget for an agency. 'None of this happened suddenly,' a man who helps make the budget informed me. 'We never go from $500 to $800 million or anything like that. This (the agency's) total is a product of many years of negotiations in order to work out a fair share of the budget for the agency.
>
> At this point it is necessary to distinguish 'fair share' from another concept, 'the base.' The base is the general expectation among the participants that programs will be carried on at close to the going level of expenditures but it does not necessarily include all activities. Having a project included in the agency's base thus means more than just getting it in the budget for a particular year. It means establishing the expectation that

the expenditure will continue, that it is accepted as part of what will be done, and, therefore, that it will not normally be subjected to intensive scrutiny.

Budgets are made in fragments. Each subcommittee, and sometimes specialists within these bodies, operates as a largely autonomous unit concerned only with a limited area of the budget. Even the subcommittees do not attend to all the items in the budget but pay special attention to instances of increases or decreases over the previous year.

The appropriations committees do not try to solve every problem at once. On the contrary, they do not deal with many problems in a particular year, and those they do encounter are dealt with mostly in different places and at different times. They allow many decisions made in previous years to stand or to vary slightly without question.

. . . It's not what's in your estimates but how good a politician you are that matters.

Being a good politician requires essentially three things: cultivation of an active clientele, the development of confidence among other governmental officials, and skill in following strategies that exploit one's opportunities to the maximum. Doing good work is viewed as part of being a good politician.

For most agencies locating a clientele is no problem at all; the groups interested in their activities are all too present . . . .

For an agency that has a large and strategically placed clientele, the most effective strategy is service to those who are in a position to help them.

The sheer complexity of budgetary matters means that some people need to trust others because they can check up on them only a fraction of the time. It is impossible for any person to understand in detail the purposes for which $70 billion are requested.

Confidence is achieved by gearing one's behavior to fit in with the expectations of committee people. Essentially, the desired qualities appear to be projections of the committee members' image of themselves. Bureaucrats are expected to be masters of detail, hard-working, concise, frank, self-effacing fellows who are devoted to their work, tight with the taxpayer's money, recognize a political necessity when they see one, and keep the Congressman informed.

Everyone agrees that the most important requirement of confidence, at least in a negative sense, is to be aboveboard. As John Rooney (D-N.Y.) once said, 'There's only two things that get me mad. One is hare-brained schemes; the other is when they don't play it straight.' A lie, an attempt to blatantly cover up some misdeed, a tricky move of any kind, can lead to an irreparable loss of confidence . . . 'It doesn't pay to try to put something over on them (committee members) because if you get caught, you might as well pack your bags and leave Washington.' And the chances of getting caught are considerable because interested committeemen and their staffs have much experience and many sources of information.

The positive side of the confidence relationship is to develop the opinion that the agency official is a man of high integrity who can be trusted. He must not only give but must also appear to give reliable information. He must keep confidences and not get a Congressman into trouble by what he says or does. He must be willing to take blame but never credit. Like a brand name, a budget official's reputation comes to be worth a good deal in negotiation. (This is called 'ivory soap value,' that is, 99 and 44/100% pure.) . . . .

. . . One official reports that he visited every member of his subcommittee asking merely that they call on him if they wanted assistance. Later, as relationships developed, he was able to bring up budgetary matters. Appropriations hearings reveal numerous instances of personal visitation . . . .

Avoid Surprise. One of the basic rules of thumb arising out of hard experience is to avoid being surprised. A diligent search of hearings, a review of the agency's programs, are all useful. But there is nothing like some inside information on what is likely to come up.

(From Aaron Wildavsky, *The Politics of the Budgetary Process* , 2nd ed. Copyright © 1964, 1974 by Little, Brown and Company (Inc.). Reprinted by permission.)

OVERVIEW OF THE FEDERAL BUDGET

The overall budget is generally the best starting point to gain an understanding of existing funding patterns. Although this overview will deal with federal spending, state or local budgets can be substituted if the target of change is at those levels. The *U.S. Federal Budget for Fiscal Year 1976* calls for an expenditure level of $349.4 billion, the largest in history. Table 1 illustrates the total federal dollar receipts and outlays by function for the last 10 fiscal years.

Over the last 10 years the federal *total* budget has increased by 150%. During this period the budget for national defense has increased approximately 80%, while expenditures for Income Security have grown over 400%; expen-

Table 1

The US Budget in Brief—Fiscal Year 1976

(Budget Receipts by Source and Outlays by Function, 1966-76, in Billions of Dollars)

Description	*Actual*									*Estimate*	
	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
RECEIPTS BY SOURCE											
Individual income taxes	55.4	61.5	68.7	87.2	90.4	86.2	94.7	103.2	119.0	117.7	106.3
Corporation income taxes	30.1	34.0	28.7	36.7	32.8	26.8	32.2	36.2	38.6	38.5	47.7
Social insurance taxes and contributions	25.6	33.3	34.6	39.9	45.3	48.6	53.9	64.5	76.8	86.2	91.6
Excise taxes	13.1	13.7	14.1	15.2	15.7	16.6	15.5	16.3	16.8	19.9	32.1
Estate and gift taxes	3.1	3.0	3.1	3.5	3.6	3.7	5.4	4.9	5.0	4.8	4.6
Customs duties	1.8	1.9	2.0	2.3	2.4	2.6	3.3	3.2	3.3	3.9	4.3
Miscellaneous receipts	1.9	2.1	2.5	2.9	3.4	3.9	3.6	3.9	5.4	7.7	10.9
Total receipts	130.9	149.6	153.7	187.8	193.7	188.4	208.6	232.2	264.9	278.8	297.5
OUTLAYS BY FUNCTION											
National defense [a]	55.9	69.1	79.4	80.2	79.3	76.8	77.4	75.1	78.6	85.3	94.0
International affairs	4.6	4.7	4.6	3.8	3.6	3.1	3.7	3.0	3.6	4.9	6.3
General science, space, and technology	6.8	6.3	5.6	5.1	4.6	4.3	4.3	4.2	4.2	4.2	4.6
Natural resources, environment, and energy	3.1	3.4	3.6	3.5	3.6	4.4	5.0	5.5	6.4	9.4	10.0
Agriculture	2.4	3.0	4.5	5.8	5.2	4.3	5.3	4.9	2.2	1.8	1.8
Commerce and transportation	9.0	9.2	10.6	7.1	9.1	10.4	10.6	9.9	13.1	11.8	13.7
Community and regional development	1.5	1.7	2.2	2.5	3.5	4.0	4.7	5.9	4.9	4.9	5.9
Education, manpower, and social services	4.1	6.0	7.0	6.9	7.9	9.0	11.7	11.9	11.6	14.7	14.6
Health	2.6	6.8	9.7	11.8	13.1	14.7	17.5	18.8	22.1	26.5	28.0
Income security	28.9	30.8	33.7	37.3	43.1	55.4	63.9	73.0	84.4	106.7	118.7
Veterans benefits and services	5.9	6.9	6.9	7.6	8.7	9.8	10.7	12.0	13.4	15.5	15.6
Law enforcement and justice	.6	.6	.6	.8	1.0	1.3	1.6	2.1	2.5	3.0	3.3
General government	1.4	1.6	1.7	1.6	1.9	2.2	2.5	2.7	3.3	2.6	3.2
Revenue sharing and general purpose fiscal assistance	.2	.3	.3	.4	.5	.5	.5	7.2	6.7	7.0	7.2
Interest	11.3	12.5	13.8	15.8	18.3	19.6	20.6	22.8	28.1	31.3	34.4
Allowances [b]	....	....	....	....	....	....	....	....	....	.7	8.0
Undistributed offsetting receipts	–3.6	–4.6	–5.5	–5.5	–6.6	–8.4	–8.1	–12.3	–16.7	–16.8	–20.2
Total outlays	134.7	158.3	178.8	184.5	196.6	211.4	231.9	246.5	268.4	313.4	349.4

[a] Includes civilian and military pay raises for Department of Defense.

[b] Includes energy tax equalization payments, civilian agency pay raises and contingencies.

Table 2

Controllable and Uncontrollable Outlays of Major Federal Agencies
Selected Fiscal Years, 1972-1976
(In Millions)

Department or agency	*1972* Total outlays	Uncontrollable	Controllable	*1974* Total outlays	Uncontrollable	Controllable	*1976* [a] Total outlays	Uncontrollable	Controllable
Health, Education, and Welfare	$71,780	$66,209	$ 5,571	$93,735	$88,344	$ 5,391	$118,377	$112,346	$ 6,031
Defense–military	75,151	22,371	52,780	77,625	25,322	52,303	90,775	28,256	62,519
Treasury [b]	22,124	21,030	1,094	35,993	34,508	1,485	43,453	41,442	2,011
Labor	10,033	8,327	1,706	8,966	7,850	1,116	22,617	20,417	2,200
Veterans Administration	10,710	8,526	2,184	13,337	10,441	2,896	15,576	12,409	3,167
Transportation	7,531	4,851	2,680	8,104	5,000	3,104	9,991	6,350	3,641
Agriculture	10,935	6,774	4,161	9,767	4,675	5,092	9,662	5,431	4,231
Civil Service Commission	3,773	3,606	167	5,692	5,446	246	8,062	7,598	464
Housing and Urban Development	3,642	3,895	–253	4,786	4,712	74	7,055	6,865	190
Funds appropriated to the President	4,276	3,000	1,276	3,329	1,775	1,554	6,610	3,811	2,799
Energy Research and Development Administration	2,392	880	1,512	2,308	971	1,337	3,815	2,002	1,813
National Aeronautics and Space Administration	3,422	1,202	2,220	3,252	1,069	2,183	3,498	1,038	2,460
Railroad Retirement Board	2,123	2,123	....	2,673	2,673	....	3,328	3,328	....
Environmental Protection Agency	763	476	287	2,030	1,054	976	3,080	2,065	1,015

[a] Estimated.

[b] Includes public debt interest payments, interest paid to trust funds, and general revenue sharing.

[c] P.L. 93-438 (January 19, 1975) transferred the energy research and development activities previously performed by the Atomic Energy Commission and other agencies to the Energy Research and Development Administration.

Sources: *The Budget of the United States Government*, Fiscal Years 1974 and 1976, Office of Management and Budget, and the Tax Foundation, Inc.

ditures for health have increased almost 1,100%; education, manpower, and social services expenditures have grown over 350%; and services to veterans, natural resources, environment, and energy have tripled. Priorities and expenditures have been changing—not as fast as some would like, yet too fast for others.

Up to 1973, virtually every attempt to change the federal budget was directed toward defense spending because it was the largest item and appeared to be the obvious target to attack and cut in order to get the dollars to shift to "other priorities." Attempts to cut or limit defense spending have limited success because defense is a *national* item. There is no comparable expenditure by states for it, and the federal government assumes total responsibility. Also, most Americans want a strong military.

Table 3

Trend of Total and Relatively Uncontrollable Federal Budget Outlays Fiscal Years 1967-1976 (In Billions)

		Relatively uncontrollable	
Year	*Total budget outlays*	*Amount*	*Percent of total outlays*
1967	$158.3	$ 93.7	59.2
1968	178.8	107.2	59.9
1969	184.5	116.4	63.1
1970	196.6	125.7	64.0
1971	211.4	140.4	66.4
1972	231.9	153.5	66.2
1973	246.5	173.0	70.2
1974	268.4	194.5	72.5
1976[a]	349.4	260.7	74.7

[a] Estimated.

Source: The Budget of the United States Government, Fiscal Year 1976.

In studying the federal budget, it is essential to be aware that in spite of an expenditure level of $349.4 billion, most of it *cannot* be shifted because there are expenditures and outlays of dollars that are "relatively uncontrollable." "Relatively uncontrollable" means that there are expenditures for which funds are obligated over which budget planners have virtually no control. They include fixed costs, such as interest on the public debt; special financing arrangements, such as provision of permanent appropriations; trust funds, for a variety of programs; increases in the number of persons becoming eligible for federal benefit payments; automatic cost of living adjustments in social security and other retirement benefits required by law; automatic price increase pass-throughs in such programs as Medicare and Medicaid; and provisions in formulas governing programs that require federal matching of state and local funds or that require payment when specified conditions are met.

To *oversimplify* "relatively uncontrollable," consider that you have a take home pay of $349.40 a month. You pay $107 a month for rent, $125 per month on food and another $70 on installment payments. Before you can buy something new, you have already committed $302 over which you had "relatively" little control. You must live, you must eat, and there are legal consequences if you do not make payments on your debts. You have $47.40 left to pay for anything else you wish to purchase during the month. The extent of uncontrolled outlays in the federal budget can be best illustrated by the data in Tables 2 and 3.

CHANGING PRIORITIES

As indicated in public opinion polls, these are the areas of most concern to the American people today:

1. The economy (controlling inflation—high cost of living).
2. Jobs (unemployment and underemployment).
3. Gasoline and oil prices.
4. Crime.
5. Taxes.
6. Health (soaring medical costs, cancer and heart research).
7. The environment (clean air, water).

In 1972, the President proposed and the Congress established a "revenue sharing" program through which $30.2 billion was given to cities and states over a 5 year period to spend as they deemed necessary. The payments averaged approximately $5 billion per year.

Assume that today the President wanted to add another $5 billion to the federal budget. Given concerns expressed by most Americans, how would you suggest the President allocate the money?

Before making your recommendations, consider the dimensions of the national problems. Unemployment exists on all economic levels, not simply with minority groups, and in some areas of the country it is over 30%. Would your advice be to create jobs with the $5 billion?

Or would you clean up the air and water because if they are lost our world will not be fit to live in? But the costs of health services are so high, would you recommend that the money be spent to make Americans more healthy and at the same time reduce costs for health services? What would you advise concerning poor people? Would you recommend that the President provide everyone a minimum income of $3,500 a year? Would you fight crime with the money or add the new money to the revenue sharing program? In view of the fact that inflation is so high and people are so heavily taxed, would you suggest that instead of the federal government spending $5 billion more, the President should reduce spending by $5 billion and actually cut the budget? Why not just cut the budget and have a tax cut too?

It must be noted that up to this point not one word has been mentioned about education, children, the elderly, the handicapped, or any other special interest groups.

Looking at the problem in another way, assume that you wanted to divide $5 billion equally among the 50 states, $100 million per state. Since many states are experiencing financial difficulties the $100 million should prove to be quite a boon. But how would you divide the money within each state? What about the major cities, how much of the $100 million should each get? New York could use the entire $100 million. In fact, the mayor of New York would argue that he could use the entire $5 billion for that city alone. How much should go to county governments? At first glance, $5 billion is a staggering amount of money, but when considered in a national context and divided in some rational manner among the states, cities, and counties, it is obvious that even this large amount is not enough to cure *all* of the needs which must be met.

So how do you reorder priorities? How do you pay for the new initiatives and directions you want to set? Decisions are made every day that alter and affect the lives of all Americans. Dollars are spent that provide services, jobs, or products deemed essential, necessary, or beneficial for the majority of the people. In every program area there will never be enough dollars to meet every need; consequently, when decisions are made, somebody is unhappy, someone suffers or even dies.

There are approximately 100,000 Americans with some type of kidney disorder that requires assistance of one kind or another, and yet there are not enough renal dialysis machines to serve all of them. Although there are dollars available to help individuals with kidney problems, there are not enough to serve *all* of them. As a result, many will die—not because budget developers or Congressmen or the American people do not care, but simply because the national priorities are not in this area. As a consequence of limited dollars, the question is raised as to where and how available money should be allocated.

In a 1972 Congressional hearing on the Vocational Rehabilitation Act, Congresswoman Patsy Mink (D-Hawaii) questioned Samuel Kountz (the surgeon who has performed more kidney transplants than anyone in the world). She asked, "Because your time is limited and you cannot help every patient you see, how do you as a physician decide who will be served and who will be turned away?" Dr. Kountz replied that "those decisions were always difficult at best to make" and he "did not have any magical formulas." Mrs. Mink then asked rhetorically, "Based upon your answer, how do we as legislators write bills in which we will select who will live and those who will *die*?"

Each cause is important and each life has value, but in terms of harsh realities, it must be recognized that the government cannot be *all* things to *all* people. Therefore, regardless of the special needs of any segment of the population, the underlying question is whether the overall benefits to the general population can be better served by helping a particular group or whether the money placed in some other area would be better spent.

Department of Health, Education, and Welfare

To see whether priorities can be changed or even whether it is even possible to serve all of the needs that exist within the constituency groups that an agency serves, focus will be placed on the budget of one federal agency, the Department of Health, Education, and Welfare (HEW). (See Table 4 for a breakdown of HEW appropriations for fiscal year 1975.)

It is obvious that there are substantial amounts of dollars allocated to many items that are national concerns. At first glance it would appear that because it now has the largest budget of any agency of the federal government there should be enough money to do all of the things that need to be done and, if necessary, enough dollars to shift funds from one category to another. A closer look at the budget, however, does not substantiate this impression.

Table 4

Selected Appropriations for the Department of Health, Education, and Welfare, Fiscal Year 1975 (in Millions of Dollars)

Programs	*Appropriations*
HEALTH PROGRAMS	
Food, Drug and Product Safety	196
Health Services	1,214
Preventive Health Services	150
Biomedical Research	2,084
Alcoholism, Drug Abuse and Mental Health	826
Health Resources	547
Medicare and Medicaid Benefits	20,274
Comprehensive Health Services	263
Health Maintenance Organizations	19
Maternal and Child Health	295
Family Planning	100
Migrant Health	24
Indian Health	287
National Health Service Corps	12
PHS Hospitals	93
Emergency Medical Services	37
National Cancer Institute	692
National Heart and Lung Institute	324
Other Research Institutes	898
Research Resources	121
National Library of Medicine	28
EDUCATION	
Elementary and Secondary Education:	
Grants for Disadvantaged	1,876
Support and Innovation	141
Bilingual Education	85
Right to Read	12
Follow Through	53
Education Broadcasting Facilities	12
Impact Area Aid	656
Emergency School Aid	102
Education of the Handicapped:	
State Grants	100
Project Grants	100
Occupational, Vocational, and Adult:	
Basic Grants	518
Innovative Programs	35
Adult Education	68
Educational Personnel Development	57
Indian Education	42
Student Assistance:	
Basic Opportunity Grants	660
Supplemental Opportunity Grants	240
Work-Study	300
Guaranteed Loan Subsidies and Defaults	430
Direct Loans	329
Incentive Grants for State Scholarships	20
Special Programs for the Disadvantaged	70
Strengthening Developing Institutions	110
Language Training and Area Studies	14

(Continued on next page)

Table 4—Continued

Programs	*Appropriations*
University Community Services, Land Grant Colleges, and Veterans Program	50
Other Higher Education	32
School Libraries and Instructional Resources	133
Public Libraries	52
National Institutes of Education	70
SOCIAL AND REHABILITATION SERVICE	
Public Assistance:	
Maintenance Assistance	4,313
Medical Assistance (Medicaid)	6,294
Social Services	1,400
State and Local Training	37
Child Welfare	50
Research and Training	18
Work Incentives	210
Assistance to Cuban Refugees	78
Trust Funds:	
Old-Age, Survivors and Disability Insurance	65,113
Medicare: Hospital and Supplementary Medical Insurance	16,768
Federal Funds:	
Supplemental Security Income	4,774
Disabled Coal Miners	876
Payments to the Social Security Trust and Other Funds	3,345
ASSISTANT SECRETARY FOR HUMAN DEVELOPMENT	
Children and Youth:	
Headstart	414
Child Abuse, Runaway Youth & Research	40
Rehabilitation Services	759
Developmental Disabilities	54
Programs for the Aging:	
Community Services	105
Nutrition	125
Research and Training	16
Native American Programs	32

As discussed earlier, the problem of "uncontrollables" can be found in every agency of the federal government but not to the extent of HEW. Of the total HEW budget projection for fiscal year 1976 of $118.4 billion, it is estimated that $112.6 billion or 95% is classified as "noncontrollable," with $6 billion considered as "flexible." The 95% provides payments mandated by law. The balance of the budget is for activities of the Department where funding levels are controlled annually through appropriations—the controllable programs. Table 5 gives a summary of the HEW budget in terms of its controllability.

Education

To this point attention has been focused on the total federal and total HEW budgets. The focus will now be narrowed to Office of Education (OE) expenditures, which are a part of the overall HEW budget. Education today in terms of actual dollars spent must be considered a national priority. The local, state, and federal funds that have been and are being spent for both public and private education (including higher education) exceed any expenditures for any other single item, including defense. Table 6 illustrates the growth and extent of expendi-

Table 5

Controllables and Noncontrollables of HEW Budget
(In Billions)

Category	*1975 outlays*	*1976 outlays*
TOTAL HEW BUDGET	$109.9	$118.4
NONCONTROLLABLES		
Trust Funds:		
Social Security Benefits	63.5	73.3
Medicare	14.2	16.4
Proposed legislation	–.3	–4.6
Federal Funds:		
Public Assistance	13.6	15.0
Proposed legislation	–.3	–1.6
Supplemental Security Income	4.7	5.5
"Black Lung" Benefits	1.0	1.0
Interest payments, loan defaults and other	.5	.5
Liquidation of prior-year obligations (controllable programs)	7.1	7.1
Total, Non-Controllable	$104.0	$112.6
% of Total	94%	95%
CONTROLLABLES		
Health Agencies	$ 2.3	$ 2.3
Education	2.4	2.1
Human Development and Other	1.5	1.6
Total, Controllable	$ 6.2	$ 6.0
% of Total	6%	5%

tures for regular educational institutions from 1963 to the present.

The federal government does not now pay a major percentage of the total cost of education, although its contribution is increasing rapidly. It is important to keep in mind that the first aid to education legislation was only passed in 1958, and in 1964 the *authorization* level for all Office of Education programs was less than $1 billion with less than $100,000 actually appropriated (see Table 7). Today the Office of Education is spending $6 billion a year in supporting various educational programs.

The federal dollars coupled with local and state funds represent an enormous investment. But regardless of how much money is available, there does not seem to be enough to meet all the pressing needs. Problems of the day, such as increasing teachers' salaries, the need to reduce excessive property taxes, aid to parochial schools, busing, and the desire for quality education are all priorities that the education community as well as government on all levels must consider and address.

Today there are 125 programs in the Office of Education. Assume that the US Commissioner of Education were able to increase the Office of Education by $500 million. With 125 programs under his jurisdiction, what arguments would you use to convince the Commissioner that *your area is more important than the other 124 and should receive additional funds?* (This identical exercise can also be adopted for use in any state department of education, any school system, or any classroom.)

Education for the Handicapped

In general, change agents do not concern themselves with the overall federal, departmental, or even agency budgets but focus their attention and efforts on the budgets and activities that directly relate to their constituency. Programs for the education of the handicapped within the Office of Education are one of the principal focuses of this book.

The federal government has had a long history of interest in the handicapped and, although there had been some legislation passed through the years for the blind and deaf, federal aid to education for all handicapped was really not "born" until 1965 when the Congress

Table 6

Expenditures (Current Dollars) of Regular Educational Institutions by Instructional Level and Institutional Control
(In Billions of Current Dollars)

	Expenditures		
Fiscal years	*Total*	*Public*	*Nonpublic*
1963-64	$ 35.6	$27.8	$ 7.8
1964-65	39.6	30.8	8.8
1965-66	44.9	35.1	9.8
1966-67	49.4	38.7	10.7
1967-68	56.9	45.3	11.6
1968-69	61.7	49.6	12.1
1969-70	69.9	56.6	13.3
1970-71	76.0	62.0	14.0
1971-72	83.0	68.0	15.0
1972-73	89.2	73.1	16.1
1973-74	96.0	78.8	17.2
1974-75	103.1	84.5	18.6

Table 7

Comparison of Legislative Authorizations with Appropriations in Office of Education Programs (In Thousands of Dollars)

Year	*Authorization*	*Appropriation*
1961	536,685	528,738
1962	583,957	587,746
1963	652,449	652,494
1964	948,017	697,629
1965	1,518,091	1,383,610
1966	3,598,969	3,339,002
1967	4,640,185	3,919,659
1968	6,450,967	3,901,707
1969	7,812,564	3,617,085
1970	10,230,419	3,813,778
1971	11,492,561	3,807,524
1972	12,192,389	5,774,863
1973	8,743,561	5,919,489
1974	13,929,824	5,991,495

passed the Elementary and Secondary Education Act. It was through that act that the Bureau of Education for the Handicapped was established and the full federal commitment to this area was begun. If one considers that federal aid to general education started late and the dollars spent for general education have been few, then the aid to education of the handicapped has been even later and less. Since 1963, Office of Education dollars for education of the handicapped have gone from $2.5 million to over $383 million in 1975 with the significant increases coming in the last 4 years. Table 8 (on next page) provides a breakdown of authorization and appropriation figures for the period from 1959 through 1976 for programs authorized under the Education for the Handicapped Act (EHA) as well as funds set aside for the handicapped from the Elementary and Secondary Education Act, Title I and III, and the Occupational Vocational, and Adult Education Act, Part B.

APPROACHING CHANGE REALISTICALLY

Throughout the chapter, the theme has been to help the reader to think about the realities and difficulties of securing funds and reordering priorities. It may have been discouraging to some, but it is the reality we all must confront daily. Awareness of what is possible plus an understanding of the problems should help to make whatever objectives each individual may have easier to achieve and rationalize. It is hoped that as a result of this presentation, people do not throw up their hands and quit by saying "what's the use, the system is too big, completely unworkable, or unmovable for me to effect change." Each individual must recognize his or her own assets and limitations and understand that what is possible might not be as extensive or complete as one might desire but that *you can make a difference.*

Table 8

Office of Education Authorization and Appropriation Figures for Education of the Handicapped
(In Millions of Dollars)

Programs	*1964*	*1965*	*1966*	*1967*	*1968*	*1969*	*1970*	*1971*	*1972*	*1973*	*1974*	*1975*	*1976*
	Authorizations (top number) and Appropriations (bottom number)												
PART B, EHA													
State Grant Program				50.0	150.0	167.375	200.0	200.0	210.0	220.0	65.0	680.0	100.0
				2.5	15.0	29.25	29.19	34.0	37.5	37.5	47.5	99.6	100.0
PART C, EHA													
Early Childhood Education (Sec. 623)						1.0	10.0	36.5	51.5	66.5	15.0	25.5	36.0
						.945	4.0	7.0	7.5	12.0	12.0	13.33	22.0
Deaf-Blind Centers (Sec. 622)					1.0	3.0	7.0	....	....	....	12.0	15.0	20.0
					0	1.0	4.0	4.5	7.5	10.0	14.055	12.0	16.0
Regional Resource Centers (Sec. 621)					7.5	7.75	10.0	....	....	....	10.0	12.5	18.0
					0	.5	3.0	3.55	3.55	7.243	7.243	7.087	10.0
Severely Handicapped Project (Sec. 624)												....	....
												2.826	3.25
Regional Educational Programs (Sec. 625)												1.0	S.S.[b]
												.575	2.0
PART D, EHA													
Teacher Education [c]	13.0	14.5	19.5	29.5	34.0	37.5	55.0	69.5	87.0	103.5	40.0	45.0	52.0
	13.0	14.5	19.5	24.5	24.5	29.7	35.0	31.9	33.945	38.96	39.615	37.7	40.375
Physical Education & Recreation Training					1.0	2.0	3.0	....	....	....			
					0	.3	.61	.7	.7	.7			
Recruitment & Information (Sec. 633)					1.0	1.0	1.0	....	....	....	.5	.5	.5
					0	.25	.475	.5	5	.5	.5	.5	.5
PART E, EHA													
Research & Demonstration	2.0	2.0	6.0	9.0	12.0	14.0	18.0	27.0	35.0	45.0	10.0	15.0	20.0
	1.0	2.0	6.0	8.1	11.1	12.8	16.0	15.0	15.455	9.566	9.916	9.341	11.0
Physical Education & Recreation Research					1.0	1.5	1.5	....	....	....			
					0	.3	.7	.3	.3	.35			

PART F, EHA													
Media Services & Captioned Films[d]	1.5 1.384	3.0 1.384	3.0 2.8	3.0 2.8	8.0 2.8	8.0 4.75	10.0 6.5	12.5 6.0	15.0 6.0	20.0 13.0	15.0 13.0	18.0 13.25	22.0 16.25
PART G, EHA													
Specific Learning Disability							12.0	20.0 1.0	31.0 2.25	31.0 3.25	5.0 3.25	10.0 3.25	20.0 5.0
TOTALS, EHA[e]	16.5 15.384	19.5 17.884	28.5 28.3	91.5 37.9	215.5 53.4	243.125 79.795	327.5 99.475	365.5 104.45	429.5 115.2	486.0 133.069	172.5 147.079	822.5 199.459	288.5 226.375

Appropriations

SET ASIDES													
Grants for Disadvantaged (ESEA) I) Handicapped Children Part A 89-313 and off top of Title I Grants for Disadvantaged			15.9	15.07	24.75	29.7	37.48	46.129	56.0	75.9	85.8	87.5	96.0
Supplementary Services (ESEA III) (15% set aside)						17.048	15.87	19.675	20.101	23.5	20.1	16.4	18.0
Occupational, Vocational, and Adult Education (Basic Vocational Education VEA-B)							30.74	32.174	38.384	38.384	41.25	42.5	42.814
TOTALS, SET ASIDES			15.9	15.07	24.75	46.748	84.09	97.978	114.485	61:884	147.15	146.4	156.814

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[a] A dash in the authorization position means there was a lack of a specific authorization caused by continuing resolution or by combined authorization with another program.

[b] Such sums as may be necessary.

[c] Authorization figures for 1959-1963 for this program were as follows: 1959, 1.0; 1960, 1.0; 1961, 1.0; 1962, 2.575; and 1963, 2.5. Appropriation figures for these years were the same as the authorization figures.

[d] Authorization figures (and appropriation figures in parentheses) for 1959-1963 for this program were as follows: 1959, .250 (0); 1960, .250 (.05); 1961, .250 (.15); 1962, .250 (.207); and 1963, 1.5 (.540).

[e] Total EHA authorization figures (with appropriation figures in parentheses) for 1959-1963 were as follows: 1959, 1.25 (1.0); 1960, 1.25 (1.5); 1961, 1.25 (1.15); 1962, 2.825 (2.782); and 1963, 4.0 (3.04).

FREDERICK J. WEINTRAUB

Politics—The Name of the Game

☐ If each of us were asked to define politics, many varying definitions would emerge. For many, politics is that process which takes place in dark, smoke filled rooms; to others, it is the process of citizens voting for their representatives in government. It is the purpose of this paper, however, to examine political behavior in a manner which is more closely in line with what advocates for exceptional children face every day.

DEFINITIONS

So that we may all have a common vocabulary, it is important to begin by defining some basic terms and concepts. *Resources* are the fundamental building materials for all human enterprise. Every human enterprise requires the use of resources—resources in terms of time, money, manpower, and facilities. In our office there is a sign that says, "Sometimes I sits and thinks, and sometimes I just sits." But even when we "just sits," we are expending time, perhaps one of the most valuable resources available. It is important to realize that in all societies, and at all times, a scarcity of resources has existed. As individuals and as advocates, we do not have sufficient resources to do all the things we would like to do.

Advocacy is the process of capturing scarce resources and directing their allocation to particular purposes. A successful advocate is one who can obtain and distribute the greatest amount of resources. Advocates are constantly engaged in the process of collecting resources and allocating them for specific purposes, with the hope that they will produce greater resources. They work to obtain capital, which they in turn use to obtain further benefits for their constituents. *Power,* therefore, is the use of resources to obtain greater resources.

Wealth is the amount of resources which are available for allocation. This is often a sensitive area, for we all think that we are reasonably altruistic, that we give and do not expect to receive. Yet in the majority of cases, when resources are allocated, they are allocated for the purpose of obtaining still greater resources. Often the return is not immediate, but the expectation of future benefit is present.

The tradition of community barn raisings is an example of this practice. A farmer might give two or three days of his time, along with other community members, helping a neighbor build a barn. By doing this, he can anticipate that, when needed, the same participants will come and help him raise his barn, a task which would take months if done alone. Thus the expenditure of a resource, in this instance time and energy, produces wealth or the potential of achieving a greater future resource.

This leads to a basic principle: The greater the wealth, the greater the potential for power. In other words, the greater the amount of resources an advocate has available for allocation, the greater the ability to obtain still greater resources in the future. In simple terms, the rich get richer, the poor get poorer. To remain in a power position, the wise advocate never allocates all available resources. Some wealth is set aside for unforeseen contingencies. This concept leads to a definition of politics.

Politics is the process of making decisions on matters which involve more than one legitimate alternative. Let me repeat: Politics is the process of making decisions on matters which involve more than one legitimate alternative. Most of the decisions people make in their daily lives are, in fact, political rather than scientific. If one were to sit down and objectively analyze any given matter, numerous justifiable alternatives for action would probably emerge.

This might not be true in the case of the chemist who knows he must use specific ingredients to achieve a predetermined result, just as it would not apply to the baker who knows that the bread will not rise unless a certain amount of yeast is added to the dough. And yet, how many of the decisions that we make daily are as objective and clear-cut as these? Few, if any, individuals can say definitively that one textbook is better than another, or that manpower can be allocated in only one way, or that the name of a high school should be one thing rather than another. All of these are "political" decisions. Congressman John Erlenborn of Illinois aptly expressed the nature of politics when he noted, "We often must choose, not between right and wrong, but between degrees of right and wrong."

Let us again consider some of the techniques noted earlier which are used in the political process. Advocates employ the concepts of advocacy for allocating scarce resources. They try to obtain greater wealth by using power. For example, my wife and I want to go out Saturday evening. There are a number of legitimate activities in which we could participate. I generally prefer going to the movies, while she enjoys going to a restaurant. I must also consider, however, the fact that I would like to watch the football game on Sunday, while she would like me to cut the grass. Perhaps by using my resources—money and time—on Saturday night for the purpose of going to a restaurant (which would be a power play), I can obtain enough "wealth" to enable me to watch the football game on Sunday.

NEED FOR INFORMATION

Most political decisions are made in ignorance; that is, most decisions are made without the decision maker having sufficient information to make optimal decisions. For example, our garbage disposal recently broke and we were forced to buy a new one. I could have referred to *Consumer Reports* or conducted a house to house survey on garbage disposals. Instead, because of limited time and a limited desire to explore the matter deeply, I telephoned three places and obtained three price quotations of $75, $90, and $110. We purchased the $90 garbage disposal on the basic assumptions that the $90 one must be better than the $75 one and that the $110 one was too expensive. The amount of wisdom or scientific technique which went into this decision is questionable. The reality of the situation is that the decision was made in ignorance, but for apparently practical reasons.

Still another reason why decisions are often made in ignorance is that decision makers have too many decisions to make. And experience has shown that tomorrow will probably require even more decisions than today.

Looking at the political process in general, and bearing in mind the definitions noted earlier, it seems evident that the most critical element in the political process is information. The old adage is true: He who controls the information controls the system. People are often negative when examining the actions of policy making bodies. How could they be so naive as to pass a law like that? The question which should follow logically is: Were they told to do otherwise? When one considers the thousands of pieces of legislation examined by the average legislative body each year and the lack of available information, it becomes evident why most decisions are made in relative ignorance. Thus, if we are to influence the system, the best thing we have to offer is information which will help bring about better decisions.

THE COMMUNICATION GORGE

There is no communication gap between advocates for exceptional children and public policy makers; it is a communication gorge. Advocates have become so proficient in talking to themselves that in many instances public policy makers do not understand who or what they are advocating. We must realize that most of the decisions which affect exceptional children are made by the butcher, the baker, and the candlestick maker, not by professionals.

I once had the opportunity to share a long airplane trip with a congressman who had strongly opposed a piece of legislation for handicapped children. (By the way, never pass up the opportunity to talk to the opposition while on an airplane; there is nowhere to go at 30,000 feet.) After considerable debate, I was still unable to understand his opposition. Finally, his eyes flashed. "Handicapped kids—you mean like the kid next door without a leg?" At last we had a point to start meaningful discussion. All along he had not understood who I was talking about.

Not too long ago, one state held legislative hearings on a bill to initiate programs for children with learning disabilities. The first witness spoke about national trends in specific learning disabilities. The second witness, from the local university, cited research on minimal cerebral dysfunction. The third, a reading authority, described programs to combat strephosymbolia. By then the legislators were squirming in their seats. It was apparent that the bill would be referred for further study. Finally, a parent saved the day. "Let me tell you about my son," she said, "He can't sit in his seat; he can't read; and he drives me up a wall." The legislators understood the problem and the bill passed.

Another element of the communication gorge is the failure to view education, and particularly special education, as part of a larger set of public concerns. Advocates tend to be befuddled by the fact that decisions by public policy makers on educational matters often reflect poor knowledge of education. Perhaps, these decisions were reached because they were based on matters of public need that transcended the limited sphere of education.

The following is an all too typical fictitious example. The departments of education and health in State X did extensive program planning for the development of a new state school for the mentally retarded. One of their main program objectives in developing the school was to increase the interaction between the child and his parents, even though the child would live in a residential facility. To accomplish this goal, it was imperative that the facility be located in an area within close proximity to the parents. Since the majority of the children came from an urban center, it was recommended that the school be located in a nearby suburban community.

The chairperson of the state finance committee, which was to appropriate the money, represented a rural district of the state. His district had been undergoing great economic decline in recent years due to a low level of industrial and professional growth and declining farm prices. Young persons from the community were leaving, and the community was in serious financial and social straits. The legislator, who was a good representative of his constituents, decided that the new state school ought to be located in his district. The construction of the facility alone would help rejuvenate the building trade, while bringing professionals into the community would help develop a new social and economic environment. The operation of the facility would also provide jobs to the many unemployed in the community.

At the same time, the representative from the suburban community was greatly concerned about the state school. The people he represented believed that the building of a new state school for the mentally retarded might lower their property values. For this reason, the state legislator opposed it. When all was said and done, there was a new state school, but it was located in the rural community. To this day, the officials of the state departments of education and health are perplexed about why their objectives were not realized.

The point is that we exist in systems of hidden and conflicting goals. Advocates for exceptional children must learn to identify and work within a broader range of societal objectives than simply those of reading, writing, and arithmetic. They must ask themselves: If we exist as part of the total political system of our community, then what are the demands that are placed on us? What are the hidden objectives? Unless advocates plan for these, their accountability efforts will not be achieved.

A COMMUNICATIONS MODEL

The following model of the political communications process may help conceptualize the information system. The elements of the model include:

- *Public policy makers,* the congressmen, state legislators, local city councils, school boards, or any similar body charged with the responsibility of allocating resources—legal, financial, or otherwise—which are used by government.
- *Agencies of government* which use the resources of public policy makers and allocate them to various societal purposes.
- *The public,* the constituents of the policy makers and the recipients of the benefits of the agencies.
- *The knowledge producers,* the researchers and the idea creators who provide input to the policy makers.
- *Formal and informal interests* which carry the majority of messages between the knowledge producers and the policy makers and between the public and the policy makers.

Basically, the system can be divided into two processes. The first concerns the needs of policy makers for knowledge to *legitimize their decisions.* The second concerns the policy makers' needs for information from the public to *legitimize their practices.*

Let's use a hypothetical example. A growing number of parents in the state of X are concerned that their gifted and talented children are not receiving an appropriate education. They turn to local educators, university personnel, and other knowledge producers for information about the needs of these children. The parents and educators decide that they want special education programs developed for gifted and talented children, but they will need specific authorizing state legislation and state financial assistance. Through individual efforts or through interest groups, they convey their desire to a few legislators who introduce a bill. State Senator Goodboy meets with a representative of the state CEC and the state director of special education. He has worked with these people on other legislation and knows their information is reliable. Their evidence and support legitimize the value of the legislation.

Senator Goodboy feels he can sell the merits of the bill to his colleagues, but he realizes that there are many good bills that do not pass, especially if they require large sums of money for their implementation. Members of The Council for Exceptional Children know that they must now work on having the constituents of all state senators express public support for the legislation. They must convince each state legislator that a vote for this measure will be perceived by his/her constituents as legitimate. This is the process of legitimization of practice.

Everyone does his work, the bill is passed, and the department of education is charged with its administration. Before the bill can be implemented, regulations will have to be developed. Often the forces that were mobilized to pass the legislation go home feeling the job is completed, only to find, months later, that a program has emerged bearing little resemblance to their intent. However, in State X the varying interest groups conveyed their views and monitored the activities of the state agency. Regulations were finally developed and the program was initiated. The knowledge producers, the public, and the interest groups then evaluated the program and conveyed to the policy makers their recommendations for the future, thus starting the process anew.

UNDERSTANDING DECISION MAKERS AND THEIR NEEDS

In order to deliver information, the knowledge needs of policy makers must be understood. Let's use another hypothetical situation.

The school board of School District X at their meeting next month will consider how to allocate a surplus of $50,000 in the school budget. Three proposals have been made.

1. The teachers of English have proposed that the ninth grade basic literature book, which was adopted in 1960, be replaced by a newer book reflecting current literature trends, and that a committee be financed to develop a course of study to accompany the book.
2. The boosters club for the football team, with support from the coaches, has proposed that new uniforms be purchased for the team. They argue that new flashy uniforms will help promote the team image and stimulate community interest and attendance at games, thus producing additional revenue for the school district.
3. A group of parents of speech handicapped children, a speech and hearing professor from the nearby university, and the director of special education have proposed that two additional speech therapists be hired. This will meet the demand for such services stimulated by the hiring of the district's first speech therapist two years ago. The two additional therapists would be able to serve the population presently identified.

In order for the speech interest to gain a decision in their favor, they will have to learn a great deal about the decision makers.

First, who will make or influence the decision? Within any decision making body, each member will differ in his or her power to influence the decisions of that body. In many cases, this power is delegated to committees whose recommendations are generally acceptable to the body at large. If the interests' resources are limited, they will want to be sure to focus on those individuals who (a) can influence others, and (b) have a reasonable potential for being converted to the cause, or at least neutralized. Do not waste time on lost causes, for example, the board member whose son is quarterback on the football team.

Second, the interests will want to assess the information needs of the decision makers to be influenced. Each member of the board has an existing predisposition to each of the proposed items to be considered. It is hard to imagine a board member who does not have some feeling regarding football. Since they all attended school, they may have opinions about school literature programs. Chances are they have had little contact with the speech program, but they may have had personal contact with someone with a speech problem.

In assessing the information needs of the decision makers, the following levels of information understanding should be considered.

1. Basic understanding, i.e., the measure is intended to do the following: "It will cause us to hire two new speech therapists and provide supportive services for a cost of $45,000."
2. Impact understanding: "By adopting this measure, we will make it possible for 200 children in need of speech assistance to receive services which may have great bearing on their future personal and academic success."
3. Power understanding: "By voting for this measure, which is supported by another member of the board, I will gain that member's support in naming the new high school after my father."
4. Status maintenance understanding: "A survey of my constituents indicates their overwhelming preference for new uniforms. I plan to run for reelection next year. I'm not sure I can go against their wishes."
5. Personal understanding: "My sister has a serious speech problem that was never corrected. It has had a damaging effect on her life. We can't let this happen to other kids."

The third point the interests will want to remember in influencing decision makers is that information as a resource changes in value over time. Constant reassessment is necessary. Several years ago, school board members were satisfied with data which documented the number of children to be served. Today they are requesting cost-benefit data. The speech interests will have to do new research to provide this type of data. Last year, the speech interest used Mrs. McKay to talk to one of the board members since they were neighbors. Mrs. McKay moved to the other side of town and can no longer be an effective communication link. In addition, there are numerous interests providing input into the system, and what was agreed upon today may change by tomorrow.

Politics is like a game of bridge: while you may want to draw trump, you usually will want to keep a trump card or an ace secreted in case of emergencies. Several months ago, the English teachers called out William Shakespeare, an influential member of the community and self styled poet, to exert pressure on the Board in support of a rather insignificant issue. While they won on that issue, and probably would have anyway, they now need the "old bard" and he can't be used again.

Finally, remember that one of the best forward actions is to reinforce the past appropriate behaviors of policy makers. Good publicity is the key to their maintenance or advancement of position. Two years ago, the football boosters club held a big rally to dedicate the new football stadium. The board members were given awards and had their picture taken cutting the opening day ribbon. Good press is the least that can be done to repay those who help, but to do so, the advocate must actively assume the responsibility and become knowledgeable about press techniques.

Now that we know about policy makers and their information needs, the big question is how advocates can be an effective political force in delivering the needed message.

EFFECTIVE POLITICAL STRATEGIES

There are two types of political communications: (a) those which are used to legitimize knowledge, to convince policy makers of what is fact, and (b) those which are used to legitimize practice, to let policy makers know how their constituents expect them to behave. Both are imperative.

Imagine a football game in action. You are the director of special education, the quarterback of the special education team. Your objective is to score a touchdown and bring about substantial improvement of policies for exceptional children. There are four basic offensive plays you can use.

1. *Up through the line.* On this play, you run into the middle of the defense. In other words, you do what most administrators do. You fill out your budget request and give it to the assistant superintendent, who considers it in light of total educational needs. The assistant superintendent slightly reduces your request and passes it on to the superintendent who, after considering the total needs of the district, reduces your request further and passes it on to the board. You rarely lose yardage on this play and usually pick up a few small gains.
2. *Around the end.* The president of the board is a friend of a friend and you happen to meet at a party. You explain your problems and send him a report indicating your total needs. This is a great play for extra yardage, but the defense, your boss, may catch you in

the act and throw you for a serious yardage loss. State and federal administrators have often heard the warning "Stay off the Hill," meaning do not talk to legislators. But everyone does; just do not get caught.

3. *The pass or lateral.* In this case, you give the ball, your proposal, to an interest group such as The Council for Exceptional Children and watch them run. They go to the board, which seeks your opinion. You respond, "I don't know where that came from, but it sounds good to me." This play can be most effective, and the good administrator will always make sure his team has a good end or halfback to be called on when necessary. The play can often score a touchdown, but it is dangerous. The ball can be intercepted if you don't pass well, and once you have given up the ball, you can lose control of its final direction.
4. *The kick or punt.* There are times when it is apparent that you simply cannot score under present circumstances. Politics is often a matter of doing the right thing at the right time. Sometimes you may want to kick the ball away or let an issue rest until you can develop the array of circumstances that will permit your scoring a touchdown.

The good advocate for the exceptional child, like the good quarterback, must become a master in executing the various plays and a master strategist in using them in a manner that keeps the defense off guard.

"WHY SHOULD I GET INVOLVED?"

Many people ask, "Why should I get involved in the political game? Special education has made good progress to date and I am sure it will continue to do so." The rebuttal to this statement is worthy of a discourse too lengthy for this presentation. But one response may be sufficient for the present purpose and may double as the conclusion.

It is true that we have made significant gains nationally in special education. While many persons have worked hard to bring this about, historically most of the success has resulted from the motherhood and apple pie image of exceptional children. It is hard to vote against the poster child image. But motherhood and apple pie will only buy so much of the public resources. When someone knocks at your door requesting a dollar, you do not ask many questions. Imagine what your response would be if the request was for $50 or $100. Special education is now in that position.

Recent years have seen programs grow as a result of the civil rights movement. If our programs are to continue to grow, the motherhood and apple pie image of special education must be combined with knowledge of what can be done to educate exceptional children, knowledge of their rights, and the muscle necessary to influence the political system. As an advocate for the needs of exceptional children, this responsibility rests heavily with you.

PHILIP R. JONES

The Professional Educator and the Political Process

□ During a recent national Democratic Party fund raising telethon, John Glenn, a former astronaut and current senator, said: "Every American is a politician whether you like it or not." Later in the same program the noted evangelist, Dr. Billy Graham, said: "The political process is the way we change things for the better."

Statements such as these should not surprise those of us who aspired to rise above the political system by acquiring degrees from accredited colleges and universities. However, I have encountered many professional colleagues in local, state, and federal educational agencies and in institutions of higher education who feel they are apolitical in their actions. In fact, quite possibly those same institutions of higher learning are remiss in not adequately preparing the preprofessional to function effectively in a political system, be it the individual school building, school district, board of education, state education agency, state legislature, federal agency, or the Congress. The political subunits of city and/or county government will also affect the educator, directly, as in a decision to locate a park or recreation facility adjacent to a school rather than at a distance, and indirectly, by competing for the same tax dollar.

Senator Glenn was not above politics while in earth orbit; in fact, he was riding in the product of a major political victory for those with aerospace interests.

Dr. Graham is in an excellent position to know that even religion has its political nature. It is interesting to note that religious denominations often have political subsystems far more structured and rigid than any governmentally related policy making group.

Like it or not, we are politicians. Fortunately, the process for change in our democratic form of government is the political process. Other forms of government are political, but under many of them citizens have little or no impact.

Dr. Graham indicated a qualitative "betterness" as he presented his views on change through the political process. The betterness must be defined in the eyes of the beholder. What may be better for you may not be better for me.

Our task then is to attempt to change conditions so that each exceptional child has an education suited to his or her needs. One might ask where, by whom, and how?

ISOLATE THE POWER

Quite possibly the first step in change through politics is determining who holds the decision making authority. An incorrect assessment of power control may lead one on a merry chase through the game of politics.

As an example, think of the local board of education. They are the employers and policy makers for the school district, but they may not necessarily be the power. The power may be the three bank presidents in the community who would never seek election to the school board, but who exercise tremendous influence on any major decision. The power may be the superintendent of schools if the board is one which rubber stamps all of his recommendations. It could be a service club, or the labor unions in town, or many other individuals or groups. However, it could actually be the board of education that holds the decision making capability.

Often the decision making authority can best be isolated by the parody on the Golden Rule: He who has the gold can make the rules. Appropriations, ways and means, and budget committees often wield far more influence on their political subdivisions than any other group.

I have often asked a group: "How many of you have written to or talked with your senators or representatives about a pending bill?" It is indeed rare if a show of hands indicates 40% or 50%. A more important question follows the first: "How many of you took time to express thanks when your position was voted on favorably by the legislator you contacted?" Far fewer hands are noted.

Some of us in the field claim to be behavior modifiers, which requires us, if I recall correctly, to praise or reward good behavior. It is appalling that those of us in public education often do not know the overall voting record of our elected officials. Even worse, we often do not find out how our officials voted on matters of significant concern to us. Letter writing and personal contacts are one process most of us have at our disposal but rarely use.

BE INFORMED

Professional organizations, such as The Council for Exceptional Children, have an obligation to keep us informed on pending national legislation and on critical measures in the various states. One way they do this is through a variety of publications, but many of us profess to be too busy to read the material. This lact of effort to become informed is inexcusable, not only because we didn't take action, but, more importantly, because a colleague or parent may ask about an issue regarding education of the gifted or handicapped and we, who are viewed as specialists, don't know the answer.

Read the newspapers and listen to newscasts to find out about issues before the many policy making bodies. It would probably be embarrassing to ask each of you reading this book if you had attended even one meeting of a public policy making body in the past year. I don't necessarily mean at the state level; I mean, for example, the board of education, city council, park board, or other policy making body in your community.

WHO SHOULD GET INVOLVED AND HOW

The issue of who should get involved is easily resolved. All of us, beginning at the preprofessional level and continuing throughout our professional lives, should get involved.

While our democracy can, and sometimes does, respond to a single individual, it is always best to unite efforts to form a group with others sharing your concerns. Better yet, a coalition of groups will have more impact on the political subsystem.

An individual or group must identify the several alternatives available to accomplish the desired purpose. Keep in mind that every action may have a direct and opposite reaction. Remember that winning the war is more important than winning a few minor battles. In fact, the perceived best alternative course of action may result in the loss of a minor battle in order to prove a point that ultimately allows winning the war. Too often, a victory in a minor battle is celebrated with such exuberance that attention is diverted from the real war yet to be won.

An excellent example of winning a battle and losing a war may be seen in several state legislatures where a mandatory special education act has been passed. Many individuals and groups who worked for the passage of such acts walked away saying, "Look what we did for exceptional children. The war is over." The legislature allowed a minor battle victory in order to divert attention while the real war was lost when contradictory regulations were promulgated and anticipated funds were never appropriated. The law we worked so hard to get on the books is worthless without the resources necessary for implementation. Count the states where this has been the pattern. They are numerous.

If at all possible obtain agreement from all parties in the coalition to present a united front on all issues the coalition selects to pursue. Also agree that no one group will give conflicting testimony, either as a coalition member or as an individual group. At times, unanimous support cannot be garnered. When that happens, work for the next best show of unity: No constituent group will oppose the coalition position. If that is not possible, then agree on what and how you will disagree.

Let's examine a few situations in which preprofessionals or students in training, teachers, administrators, college or university faculty, and agency personnel can get involved.

PREPROFESSIONALS

Preprofessionals or students in a preparation program can have tremendous impact on a political system. They should also be aware that the nearest and most politically structured and operated organization at hand is the public or private institution of higher education they attend.

The campus activist movement of the late 1960's and early 1970's has subsided, but it did demonstrate the attention that groups of students can bring to bear on the system. The major lesson to be learned from the campus uprisings is that students can become involved in political causes and effect change.

What can students do? The options are limitless, but let's examine a few hypothetical situations.

Many students in teacher education, including those preparing to work with exceptional children, feel that state certification requirements are too course-bound, antiquated, and in general somewhat useless in relation to teaching children. What can be done? Student groups should organize to gain numbers. The Student Council for Exceptional Children, the Student NEA, the math teachers club, and other student organizations should get together and organize around common concerns. Students in other colleges in your state should not be overlooked. They may also be concerned. Remember, there is strength in numbers.

After organizing, determine who makes the decisions about certification. Each state has some agency governing teacher certification. It is usually the state education agency, but it may be a separate governmental entity in charge of registering and licensing professional and trades personnel, or it may be a private association. Wherever it is located, there is probably an advisory committee, elected or appointed commissioner, or similar group which proposes changes and conducts hearings on the proposed changes.

The state certification process may be extremely specific, such as requiring a course in the history of the state where you are seeking certification, or it may be general, for example, merely requiring a student to complete a minimum of six hours in history. If your state certification office is one which sets specific requirements, that commission or agency advisory group is the point to approach and persuade on behalf of your position. Friendly persuasion varies from providing the commission with a well written, logical development of your position, to a sledge hammer approach, in which large numbers of students attend commission meetings. The possibility of faculty support for your cause, either as a group or as individuals, should also be explored.

If your state has general certification requirements, the problem may be within your own institution. If a specific pattern of courses has developed, then apply pressure at the level where the authority to change the pattern rests. This could be a faculty committee, the dean, chancellor, president, or trustees. Be sure to focus your efforts on the right group. Attempts to divert you may be made by the status quo maintainers in the college. When dealing with certification requirements, try to get some recent graduates who are now teaching to return and give their opinions on the requirements.

Let's look at another possible situation. Your institution runs a master's and post master's program with a program assistance grant from the U.S. Office of Education's Bureau of Education for the Handicapped (BEH). The resources of the program (faculty, material, field experience, etc.) are all focused on the graduate programs, and undergraduates are receiving a somewhat less than desirable program. What do you do? Try to work it out on campus through the chairperson, dean, or other responsible administrator. When or if all else fails, send a petition or letter from your group to BEH, explaining the problem and questioning the attention given to graduate programs. Your institution's proposal for training funds discussed the undergraduate program, even if no funds were requested for it.

If your program is totally state funded, approach your state regents, trustees, higher education commission, or legislature with your complaint.

A more recent example relates to my tenure as an officer in The Council for Exceptional Children (CEC). Student CEC (SCEC) proposed additional budgetary items for travel by the SCEC executive committee and board of governors. The request was valid for the purposes described, but the same result might be achieved through sources other than the CEC budget.

Information provided to SCEC officers included the following points. It is an honor for the institution of higher education to have an SCEC officer from that program. If you have not already done so, tell your university or college dean, president, or trustees through the student paper, personal contacts with administrators, radio, television, and other media. The chapter should perform this public relations pitch so that the individual officer does not have to praise himself. Capitalize on the situation; accentuate the positive. Let the institution take credit for the fine program and the honor achieved by having an officer or governor in the program. This approach is known as "warming the water."

Now it is time to "throw the goose into the boiling pot." The time comes for the SCEC officer to travel to the neighboring state to attend a leadership conference or other function. The chairperson, dean, or other responsible person now must become accountable for the glory the institution has received. The trap is sprung with the request for full or partial support to attend the meeting. If you are careful and have done your homework, you may find that a university car is being sent to the meeting or that a faculty member is being reimbursed to drive to the meeting.

This same approach may be used to gather support for attendance at the state federation convention by the entire chapter membership. I can hear it now: "But we have to be there to support Lee who is the state SCEC president." Or, "But we may never again have the opportunity to hear Sam Kirk, and besides it's only 175 miles to Metropolis. Reimbursing us for mileage at 13 cents a mile for 350 miles is a lot less expensive than trying to get Dr. Kirk to come to the campus as a speaker."

TEACHERS

Teachers are obviously more militant today than they were just five years ago. The number of strikes has increased each year as the teacher organizations—be they AFT or NEA affiliates—have achieved greater success in organizing and developing collective bargaining techniques at the local unit level. (Collective bargaining techniques are sometimes erroneously known as professional negotiations, a term selected as politically preferable.)

The political process is evident throughout, from the time of requesting an election, to the selection of the exclusive bargaining agent, to the securing of a master contract, and then back through the whole process the following year. The impact of this process on exceptional children can be positive or negative. For more information on the impact of collective bargaining on exceptional children see the chapter in this book by Sosnowsky and Coleman.

Most teachers of exceptional children belong to groups whose primary purpose is to improve employment conditions and benefits. Teachers of exceptional children also compose a large percentage of the 67,000 members of The Council for Exceptional Children, whose primary function is to guard the rights and improve the education of exceptional children. CEC is in business for kids. I'm afraid we could count the number of such professional organizations on the fingers of one hand.

CEC chapters can exhibit their concern for children through representative attendance at board of education meetings. Even if the delegation initially does nothing dramatic, school officials will learn that you are representing the interests of exceptional children and are members of the local CEC chapter. This will probably result in your being called on by the board from time to time, which is really what you were seeking. Being asked to speak through this process is far better than going to an occasional meeting and demanding the floor.

Teachers can be more effective than administrators in talking to political power groups in the community such as the Rotary or other service clubs, the Chamber of Commerce, church groups, and the PTA. Notice the apparent oversight of the elected or appointed policy making bodies, but recall that they may not hold the true power. Teachers are also very effective in talking to these policy making bodies. Often the individual or group listening to the teacher identifies the teacher as the one school employee who really knows what is going on in the schools. The administrator or supervisor may say the same thing as the teacher, but the group may feel the adminstrator's information is presented only to assist the administration.

A film or slide-tape presentation describing the special education program and services should be prepared in all communities. A media presentation of this type assures a common base of information for all groups. The school employee, preferably a teacher, who meets with the group then serves as a resource person to answer questions. In addition to gaining support for special education at the grass roots level, this type of activity can often lead to donations of supplies, equipment, money, and volunteer support of the program, both in and out of the classroom.

The final section of this chapter contains several suggestions on methods of personal and written contact with elected officials. To know whom to contact you should keep in touch with the CEC Political Action Network (PAN) coordinator for your state. PAN was initiated by CEC in 1972. Each state has a coordinator who has received training and information on how to be effective in the political process. Why not have the PAN coordinator for your state meet with your CEC chapter?

Invite various community groups to visit your classroom for coffee and cookies after school ; invite the superintendent and board of education to visit your class. The range of possibilities for involvement are endless. Why not start tomorrow?

ADMINISTRATORS

I am aware of two states whose boundaries are contiguous and both have formal organizations of administrators of special education. In one state, legislators are not really aware of who the group is or what it represents. In the other state the group's opinion is actively sought by the education committees of the state legislature. In one state only three or four members of the administrators' organization are aware of legislative proposals and their status in the legislative process. In the other state weekly, and at times even daily, legislative bulletins are issued. In addition, an effective and active telephone network is in readiness.

You tell me which state has the greatest legislative success.

The Illinois Administrators of Special Education (IASE) in a recent legislative session led a coalition for increased funding of special education. The bill passed both houses, only to be vetoed by the governor. Many states would view this as a defeat and take a "wait until next year posture." Not so in Illinois. IASE members contacted every member of the house and senate to determine the probable success of an override attempt. The organization of this effort was so effective that the IASE leadership knew precisely when to ask the speaker of the house and the president of the senate to call for an override vote. The call for the vote was made only after IASE members knew they could deliver enough votes for a successful override.

The administrator is often the person who must prepare and present reports, requests, or testimony to official and quasi official policy making bodies. It is critical for the administrator to keep abreast of the latest information on law and litigation. Again, The Council for Exceptional Children can provide help and invaluable information. Various CEC products have summarized such areas as judicial decisions, class size, transportation, and finance.

Whenever possible, the administrator should involve other staff members and parents in these presentations. The payoff may be greater when the impact of these other groups is felt

Mustering parents and other interested groups is an effective technique in some critical situations. This pressure group resource should be used sparingly, lest its impact be diluted and its effectiveness lost. Some battles must be fought by the administrator or group of administrators alone. The successful administrator has a keen sense of knowing when to send his ready reserve into action.

PROFESSORS

All too often professors in institutions of higher education are the least involved and least organized. The potential membership in the American Association of University Professors and other professor unions is nowhere near realization. The number of professors of special education who belong to CEC is also extremely low. I have been asked many times why a well known professor is not involved with a particular CEC committee or program. The question is easy to answer when the individual in question is not a member of CEC.

CEC has done a great deal for higher education by obtaining resources for the preparation of special education personnel. Yet many institutions of higher learning have made a commitment to special education programs only while "soft" money (federal grants) is available. The lack of involvement of professors in the highly political, slow changing beast called a university is appalling.

Many major universities claim large numbers of faculty in special education and large enrollments. On closer examination, however, it is often found that only three to five of the fifteen or twenty faculty positions are supported by university appropriations. The balance are supported by federal or other soft funds. If the foundation of a building, which should be all reinforced concrete blocks, is built using blocks only every four or five spaces with sandstone in between, the building will shake, tumble, or collapse at the slightest pressure.

Certainly I do not advocate ignoring the various sources of soft money, but the faculty which sits by and lets an entire program be built with soft money is an unwise group of intellectuals. The faculty, led by the chairperson, can work the soft money resources to their advantage by using outside funds to initiate new and/or costly programs which will be institutionalized in a few years. If the university does not pick up the funding of successful programs, the chairperson and faculty can refuse to write additional proposals until a firm financial commitment is made in writing by a responsible university administrator.

The introduction to this chapter noted that many of us attempted to rise above the political process by obtaining as many degrees as possible. Based on the lack of involvement by professors, it would seem that those who have obtained terminal degrees believe this to be true. If professors continue to be uninvolved in the current age of accountability, declining enrollments, and shrinking resources, many preparation programs for teachers of exceptional children will wither and die on the vine. A good departmental faculty must have a variety of specialists who become involved in both university and nonuniversity political subsystems if that faculty is to survive the test.

GOVERNMENT EMPLOYEES

In the context of this chapter, it seems appropriate to discuss agency personnel, those professionals employed by governmental policy making bodies. They are, in fact, employed by or as a result of the political process. As in other organizations, there are good and bad personnel in the agencies. Some states continue to elect the chief state school officer, while others are appointed. The professional staff may be patronage employees, or they may be appointed on a nonpartisan basis or through competitive Civil Service evaluation.

Often the professional in the field will be disappointed by statements made by state and federal agency personnel during a hearing. But as in most organizations, when a person accepts a position, he is required to present the administration's position when representing that organization. That is a fact of life for many government employees.

A person in such a position, who has an advisory responsibility to the policy making groups, may be invaluable in the political process. While the agency person who represents the administration's position on a particular concept or issue may have to say, for example, "We don't need any more money for the education of exceptional children," that same person may furnish CEC with the precise information necessary to overcome such testimony.

Learn to work effectively with government employees. It is difficult to work against the system, so learn how to use the system for the benefit of exceptional children.

It is difficult to cover all the possibilities for involvement by professionals in the political process. Volume upon volume has been written about the political process. The keys to effectiveness are knowing what has worked in your community in the past, isolating the true power, organizing those who have common concerns, selecting the perceived best alternative course of action, and pursuing it.

Don't be afraid of getting involved. Try it! You'll like it!

CONTACTING ELECTED OFFICIALS

ACCENTUATE THE POSITIVE

All too often public policy makers—local, state, and federal—are not knowledgeable about the needs of exceptional children and the services that special education provides. Historically, special educators have emphasized the critical shortages in the field. This emphasis has been effective and should not be diminished; however, much progress has been made in the field and it should be emphasized.

The time has come to accentuate the positive, to let the public and our elected representatives know of the good that is occurring for exceptional children and the needs that are still unmet. You can help in this endeavor by stimulating some of the following activities:

- Invite your congressmen, state legislators, school board members, and other public officials to learn about special education. Some groups have sponsored a community special education day during which tours were conducted and a luncheon or dinner held. Consider a "meet your congressman" type of meeting.
- Prepare an annual report for your legislators explaining the status of services to exceptional children in their district. Such reports should include statistics on the number of children receiving services and the number still needing assistance, descriptions of programs being offered and community involvement, and an indication of the impact that federal aid has had and could have on the programs. Public policy makers are always interested in receiving such reports and will often publish them in the official records.
- Invite public policy makers to speak or attend an organizational meeting or banquet.

When you want to involve a public policy maker in your local activities, many points must be considered.

His time is at a premium. Make your arrangements through his local or business office well in advance. In a letter of invitation, describe his expected participation (speech, question and answer, remarks after receipt of an award) in your meeting and let him know specifically when he is to arrive and when he can leave. Ask him for alternate dates if he cannot attend on the date proposed. Follow through on a regular basis to confirm his attendance. Leave your schedule flexible enough to accommodate minor changes. It may be necessary to furnish transportation to or from a nearby location for him.

Don't allow him to be placed in an embarrassing situation. Work with his staff well enough in advance so that he is prepared for his audience. Select the audience with care to avoid unpredicted occurrences.

Be sure that any information presented to the policy maker is accurate. If not, you may find it coming back to haunt you.

Policy makers will be more interested in participating in local improvement of special education if they can identify community interest. Therefore, you will want to involve as many of your group and as many community groups as possible.

If a question and answer session is planned, arrange for persons who are well informed on current issues to draw up questions in advance of the meeting. Furnish the questions well in advance to him. The tone of the questions and answers and of the general meeting should not reflect any belligerence or antagonism.

Draw up a timetable for the meeting or event and stick to it so that he is not detained unnecessarily.

Legislators and other policy makers depend greatly on publicity. The best payment you can make for their support is providing extensive press coverage. Assistance is usually available from their office. All local media should be advised of the date, time, place, and nature of the meeting, and the fact that they are invited. A press table or reserved seating section close to the speaker's platform should be provided. If a meal is involved, the press, radio, and television should receive complimentary tickets. If agreeable to the policy maker, his prepared remarks may be distributed when the meeting begins. If he wishes a press conference, this should be arranged ahead of time in cooperation with his staff.

A five minute introduction of the policy maker is suitable. Biographical information is available from his office, but do not read it verbatim. Good introductions include at least his committee assignments and any particularly outstanding legislative accomplishments. Introductions do not have to be "flowery," but they should be friendly and accurate.

Consider use of a photographer or even a Polaroid amateur. The purpose is not to take photos of everyone in the audience, but to take some pictures showing the legislator with key officials, receiving an award, or interesting shots with children.

Followup must include a letter of thanks to your guest. Enclose any especially good photographs.

HOW TO CONTACT A LEGISLATOR

Representative government functions best when there is open and meaningful communication between elected officials and their constituents on pressing legislative issues.

As a citizen and as a professional with a command of at least one field—the education of exceptional children—you are in a position to furnish related information to your elected representatives at all levels of government.

Principally, your contact may be through a telephone call, letter, telegram, or personal visit. In any case, you should not misuse or abuse your access to him or his staff. Albeit important, only part of his job is receiving and responding to hundreds, even thousands of letters, telegrams, phone calls, and visits every day. At the same time, if your contact with your representative is timely, responsible, and respectful, the communication will be of mutual benefit. He needs you, and you need him.

When You Telephone Your Legislator

He usually has a very busy legislative schedule, and he may be out of the office when you telephone. State the reason for the call, and ask if you can talk to his administrative assistant or another staffer. If it is suggested that your call be returned later, give your telephone number and indicate the general time you will be at the number. Then be there.

Your telephone conversation with the legislator or a member of his staff should follow the usual rules of courtesy. Be pleasant. Be brief. Tell why you are calling and be prepared to answer questions or provide related information, as succinctly and clearly as possible. Do not threaten or intimidate.

When You Write Your Legislator

An individually composed letter is an excellent way to communicate with your elected representatives. The same letter sent individually by hundreds or thousands of people is not. The latter are a nuisance and reflect poorly on the prestige of the group and its individual members.

Here are some suggested do's and don'ts to assure that your letter receives maximum attention.

- If possible, send a typewritten letter on one side of a sheet of stationery.
- Address the letter to Honorable John Doe, House of Representatives, Washington, D.C. 20515, Dear Mr. Doe. For Senators, Honorable John Doe, US Senate, Washington, D.C. 20510, Dear Senator Doe.
- In one or two sentences in the first paragraph, identify the subject of your letter; state the name of the bill together with its House or Senate bill number.
- The second paragraph should contain your reasons for writing about the bill; your own personal or professional experience provides the best supporting evidence. Be reasonable. Do not ask for the impossible. Do not threaten.
- The third paragraph should ask the legislator where he stands on the subject. Ask him to state his position in his reply.
- The fourth paragraph should express in one sentence your appreciation to the Congressman for his attention to the letter and, if you like, for his continuing service to your district or state.
- Unless you are using professional or personal letterhead stationery, be certain your full name and address appears after your signature.

If he pleases you with his vote on an issue, write and tell him so. A large amount of the mail legislators receive is from displeased constituents.

The timing of your letter is important. If possible, write when a bill is pending in committee. However, sometimes your legislator may reserve his judgment—and his vote—until the sentiment of his constituency has crystallized.

When You Wire Your Legislator

This is a good technique, if not overused, to suggest that your representative support or oppose a bill on a day legislative action is expected.

Important points to remember: Boil down your message, maintaining meaning and clarity but eliminating unnecessary verbiage. The more you write, the more it costs. In most cases, a telegram should not extend beyond three typewritten lines plus your name and address.

A tip: Western Union has begun a special service for persons wishing to register their legislative stands with their elected representatives. Called POM (public opinion message), the service allows you to send a message of fifteen words and your name and address to the governor, a state legislator, or a representative or senator for 90¢.

When You Visit Your Congressman

Make your appointment as far in advance as possible. State your reason for the appointment.

Do not be there on time—be five or ten minutes early. Always. Be prepared to wait because there may have been unavoidable delays and changes in his schedule.

Be informal, but not disrespectful. Do not threaten or intimidate. Tell him exactly who you are, why you are there, and what you want him to do. Be prepared to answer questions or leave copies of key materials. Do not argue if he disagrees. Unless he urges you to stay, do not remain more than 15 minutes. Thank him and then leave.

A thank you note to him should be written immediately following your visit.

You may be routed to a staff member at the time of your appointment. Usually this is not intended to slight you or the subject matter about which you are concerned. The last minute press of legislative business may force a complete rejuggling of the congressman's schedule, you included. There is a strong chance the staffer will be familiar with your subject matter. In any case, he will undoubtedly talk with the legislator or send him a memo regarding your visit, so talk to a staff member as you would to the legislator himself.

If you are traveling to Washington or to the state capitol on business or are there on a vacation, visit the office(s) of your representative(s). His staff can often arrange a special Senate and House permission for you to observe the floor debate. In addition, if sufficient notice is given to a legislator's office and if the tours are not already filled, they can arrange to include you on a special tour. When in Washington, stop by CEC headquarters, too, located in nearby Reston, Virginia, at 1920 Association Drive.

WHEN YOU TESTIFY

Legislative committee hearings provide, through their witnesses, an excellent opportunity to present the case for special education, to attract legislator and public support, and to help assure that the government—local, state, and federal—enacts the kind of laws which will bring progress for exceptional children.

Because legislative testimony is so important, what follows is a brief introduction to its preparation and presentation.

Why a Hearing?

A specific bill is officially referred to a committee or subcommittee so that members of the committee can explore the various sides of a subject in order to recommend a specific legislative action on the bill. Since the total legislative body does not attend, the hearing is important since most legislators, all of whom may eventually vote on the bill, lean heavily on the proceedings and recommendations of the duly constituted committee convened to explore the matter in depth.

Why Oral Testimony, If Possible?

Spoken testimony, delivered by a knowledgeable, articulate person, gives life to a point of view. While a letter or written statement can be included in the printed record of the hearings, it lacks the sense of urgency, significance, and clarity of a face to face presentation. The witness may be accompanied by another knowledgeable person to help in answering questions.

What Should You Know?

You should specifically know what the committee is considering—a few segments of an issue or the entire issue. You should know what "the opposition" says and be able to answer questions from a committee member who may hold an opposing view. You should know, even if the committee does not request lengthy and in depth material and answers, the reasons for your position on the matter (including statistics, surveys, and authoritative reports).

What Should You Write, and How?

Preparation of testimony should not be done hastily or sloppily. It should be written only after all data is gathered and some conferences with key persons in the field are concluded. Drafts may be shared with several in the field.

The first sentence of the testimony should begin with the name and job of the witness, as well as the group on whose behalf he is testifying, and should conclude with the bill number and title, the subject of the hearing. The second sentence should identify any person accompanying the witness to help answer questions.

The testimony should be accurate, well reasoned, well organized, lucid, and stripped of any unnecessary verbiage. Quotations and statistics may be included. The point is to present a strong case for the position you take: for example, totally for or against, for with limitations, the subject needs further review, need to raise or increase provisions in the bill (more money, more books, more schools). In no event should testimony be antagonistic or belligerent.

The testimony should be typed double spaced. Subheads may be used if the material is lengthy. Care should be given to spelling, grammar, and appearance of the testimony. Multiple copies will have to be forwarded to the committee staff in advance, according to their schedule.

Appearance before Committee

A witness should never get "cold feet" when the hearing day arrives. He has been summoned to testify because he has a recognized area of expertise and experience in the area, and he should do his sponsoring agency and the committee credit by approaching it honestly, openly, and forthrightly.

Often a witness is asked not to read his entire prepared statement but to summarize it, although the entire text will appear in the printed record. He should be able in advance to do so, always stopping when committee members may interrupt with a question or point of information. The questions asked should be answered as they arise, unless the subject in question is explained later. In such a case, the witness may say so.

When You Do Not Have the Answer

Sometimes, during the oral presentation or the question and answer session following, the witness is not immediately prepared to provide a full answer (or statistics, or results of a report, etc.) to a question. It is quite appropriate for him to admit this, asking the committee's permission to provide the information for the record as soon as possible.

Before You Conclude

Thank the members of the committee for the opportunity to present your testimony.

MARTIN L. LA VOR

Time and Circumstances

□ Today most Americans take for granted the idea that the federal government is a partner in financing education and that Congress each year will pass some measures affecting education. This has not always been the case. In 1836 there was a move in the US Senate to dispense surplus money from the treasury among the states for the purpose of helping to build schools but it did not receive much support. More than 120 years later there was still not much Congressional support, let alone action, for federal aid to education. After World War II, some movement began, but formidable opposition materialized and nothing resulted. Although schools throughout the nation needed help, the time was not right for a federal government commitment in this area. The proper *time* and *circumstances* did not exist; consequently, routine delays, parliamentary delays, and jurisdictional delays were commonplace. In fact, there was maneuvering and manipulating with the sole intention of killing any proposals that would provide federal funds for education.

One morning in 1957 Americans woke to learn that the Russians had fired a satellite into orbit around the earth. There was shock, indignation, and questioning: How and why could this country's educational system and technology have fallen behind the Russians'? All of a sudden a national crisis existed, and the *time* was right for action. With the goal of helping America catch up with and surpass the Russians, a crash program developed, quickly passed the Congress as the National Defense Education Act, and was signed by the President.

Thus, federal aid to education was born, as a result of national pride and rivalry. The same needs and problems had been apparent for years to supporters of aid to education, yet it was an event outside of the educational world which changed the *circumstances* which opened the door for federal aid to education legislation.

Aside from brain power, time and circumstances are the most important components in the development of legislation as well as in the effecting of change. Basic concepts regarding these components might be summarized as follows:

1. Circumstances happen in a variety of forms and have many meanings e.g., fate, public sentiment, etc.
2. Circumstances can often be controlled or manipulated.
3. You must create the atmosphere for the crisis or cause; you must keep issues alive. Dramatize factors and events. Dramatization can produce a positive effect. Negative publicity can dull or completely ruin a good cause.
4. You must recognize that events such as your position, bill, or cause are affected by factors other than those directly at issue.
5. You must legitimize your cause; work with others. It is difficult to win alone. It is difficult for an individual to spend every waking hour working on a single cause.
6. People of stature who take positions can be very influential; the families of both President Kennedy and former Vice-President Humphrey have retarded members, and the public actions of these men helped open the door for all retarded individuals.
7. To achieve success may take years.
   Be flexible; those who cannot or will not compromise rarely win.
   Don't get locked into one position. (A rigid position formed in 1970 might not fit into factors or circumstances at work in 1976.)
   Information, as well as participants or key

individuals, change over time—as do circumstances.

8. You must thoroughly understand all sides of an issue.
   Recognize that for every idea there is at least one opposing idea, or another way of accomplishing the same thing.
   Understand the opposition and help to diffuse it; recognize that it is not always or necessarily wrong.
   Be prepared to deal with ideas not yet voiced.
   Be prepared for the known and the unknown. (It is not necessary to aim for the unknown, but an individual must be prepared to deal with it.)
9. You must recognize the scale of your cause in terms of importance. How important is it to the majority of people throughout the nation?
   It may be more important than you think.
   It may generate no public interest or support.
10. An act of strategy in one area may influence actions and decisions in another. It is advantageous to direct efforts toward many targets.
11. Timing is critical.
    One must recognize when the time is right to take action.
    It is difficult to influence a decision once it has been made.
    In policy making, there is a continuum of movement toward resolution.
    It is essential to know where the decision makers are at any given point.
12. For the time to be right, the environment must also be right. Generally there are many factors, two of which are critical:
    - Circumstances at play in the country.
    - The atmosphere and time in which individuals will move and react.

    Both of these factors are in a state of constant change, but they generally can be influenced and/or controlled.

Some additional practical guidance attributed to "The Philosophical Approach of 'Jefferson of Oxford'" (the author is unknown):

First Law of Human Interaction: If anything can go wrong, it will.

Corollary I: If anything just can't go wrong, it will anyway.

Second Law of Human Interaction: When things are going well, something will go wrong.

Corollary I: When things can't get any worse, they will.

Corollary II: Anytime things appear to be going better, you have overlooked something.

Third Law of Human Interaction: Purposes, as understood by the purposee, will be judged otherwise by others.

Corollary I: If you explain something so clearly that nobody can misunderstand, somebody will.

Corollary II: If you do something you are sure will meet with everybody's approval, somebody won't like it.

Corollary III: Procedures devised to implement the purpose won't quite work.

To illustrate why time and circumstances are the primary factors which affect the passage of social legislation, one can look at the experience of congressional Republicans who in the early 1960's attempted to develop national early childhood education legislation. Although some Republicans in the House of Representatives constructed proposals and attempted to establish new legislative authorities in this area, the first years of the 1960's were not the time for new legislation for preschool children. It was not the time for Republicans to be promoting new and innovative ideas with Democrats in the White House and in control of the Congress. (It must also be noted that there were Democrats in the Congress at the same time who were interested and concerned about this subject and were developing similar legislation, but the time or circumstances were not right for them either!)

The concept of child development as it is known today was not ready for exposure during the 1940's, 1950's, and 1960's. It might not have emerged at all had it not been for the assassination of John Kennedy, the election of Lyndon Johnson, and the subsequent wave of enthusiasm to pass social legislation. Today, however, it is commonplace to discuss preschool, child development, day care and home care legislation. The subject has been "discovered" and, in fact, many find it difficult to understand why so "little" has been done during the last 20 or 30 years, or why this nation has not met the child care needs and challenges. The facts are that there were men and women of vision in Congress in the 50's and early 60's who clearly saw these needs. Their concepts and proposals were not too dissimilar from those still being considered today; in fact, many of those early ideas were the basis of an Office of Economic Opportunity (OEO) program beginning in 1965 known as Project Headstart.

FEDERAL INVOLVEMENT IN PROGRAMS FOR CHILDREN

The first federal authorization of child care services was contained in the Social Security Act of 1935, as part of a program designed to provide aid to families with dependent children. Although some monies were made available for services to children, most of it was spent to provide "babysitting services."

In order to accommodate women who were needed to work in defense plants during World War II, the federal government spent approximately $50,000,000 for day care centers under the Lanham Act. That Act provided funds to carry out "those functions of community life which were necessary for national defense." It specifically mentioned such things as schools, garbage collection, waterworks, and hospitals; it did not, however, mention day care.

It was not until 1964 that money for child-related programs was made available through the Economic Opportunity Act (EOA). This Act constituted "the war on poverty" and, although there was no specific language in it calling for the establishment of programs for children, Project Headstart did emerge from that legislation. The EOA was loosely written; it gave the director authority to do virtually anything that he felt would "help to eliminate poverty." A program was initiated to experiment with early childhood development concepts and delivery systems. Virtually overnight, the idea of a "headstart" for needy children captured the public's imagination and early childhood legislation was on its way.

In 1965 the Congress passed the landmark Elementary and Secondary Education Act. Here again, there was no specific statutory language establishing preschool or child development programs, but the law did provide substantial funds and flexibility in two titles of the Act to allow any type of program development which a local education agency felt met the needs of students and the intent of the legislation.

Title I of the Act was designed to assist educationally deprived children in areas with a concentration of low income families, and Title III was to develop innovative and imaginative solutions to education problems. Although Headstart funds were limited, public pressure for child care services was increasing and educators were beginning to recognize the value and need for early intervention. Many school systems, therefore, began using ESEA funds for preschool programs.

In 1966 the Demonstration Cities and Metropolitan Development Act was passed and a federal program called Model Cities, designed to restore and upgrade impoverished neighborhoods, was established. In 1967 Congress amended the Social Security Act by adding the Work Incentive Program (Title IV-A) which provided funds for child care services. Although these two new authorities provided money for child care services, they were not specifically intended or designed for that purpose.

In 1966 the Congress actually wrote Project Headstart into the Economic Opportunity Act, not because of the desire to help children or expand the program, but because of the practical necessity of getting the legislation through the Congress. For, from its inception, the OEO was under intense criticism and pressure; and therefore pragmatic supporters felt that with key programs such as Headstart, legal services, and comprehensive health services specifically written into the law, it would be harder for members of Congress to vote against it. They were right!

The history of Headstart has been well documented. It has its supporters and detractors, but regardless of whatever it was and is, Headstart opened the door and paved the way for child development legislation. It should be noted, however, that to this date, there is no specific federal authority exclusively written providing comprehensive child development services to all children; in 1971, President Nixon vetoed the only bill on this subject ever to emerge from the Congress.

TIMING AND CIRCUMSTANCES ILLUSTRATED

Getting a bill signed into law can be difficult, and often requires years of continuous hard work by legislators and other supporters. An outstanding illustration of the difficult path that a new idea must travel, and the complex factors involved in the final outcome is the story of child development legislation.

To understand the evolution of child development legislation in the Congress, it is necessary to go back to 1967, and look at a bill introduced by Patsy Mink (D-Hawaii). Prior to that time, the Congress had never held an official hearing solely on the matter of child development services in day care or preschool settings, although Headstart was discussed each time the OEO bill was considered. In 1967 Mrs. Mink contended that child day care programs (Headstart included) had limitations which could be corrected with additional funds. She expressed the feeling that it was necessary to provide supplementary educational services and equipment in addition to the basic services which were already available. Her bill called for an expenditure of $300 million.

Although the bill was introduced in 1967, it was not until 1968 that Dominick Daniels (D-NJ), then chairman of the House Select Subcommittee on Education, scheduled hearings on child care. These were primarily exploratory hearings, for few members actually knew much about the subject. The subcommittee conducted several days of hearings, but took no action on the Mink bill. The hearings indicated that although many of the concepts Mrs. Mink proposed were valid, they were not as important as other, more basic needs which the Subcommittee discovered were not being met. Toward the end of 1968, Mrs. Mink began to change her opinions and, together with other Democratic and Republican members of the Education and Labor Committee, began to develop new proposals; these were the first steps in the development of a comprehensive child care bill. The Mink bill opened the door, but just as with Federal aid to education legislation, 1968 was not the right time for passage.

Congressman John Brademas (D-Ind.) became the chairman of the Select Education Subcommittee in August 1969. With a deep personal interest in child care programs, plus an instinctive feeling that 1970 would be the year legislation in this area could attract popular support, he along with 50 others, introduced the Comprehensive Child Development bill (a bipartisan bill). Simultaneously in the Senate, Walter Mondale (D-Minn.) introduced an amendment to the Economic Opportunity Act which he called "The Headstart and Child Development Act." At the same time, Republican house members, led by John Dellenback (R-Ore.), developed their own child development proposal. At this time, and by coincidence (but totally independent of the Dellenback effort), the Nixon administration was developing proposals to reform the welfare system; their proposal also contained provisions for day care programs. The administration's welfare reform bill, as it was being constructed, was to go to the Ways and Means committee. Dellenback and other Republicans on the Education and Labor committee thought that both Republican efforts should be combined, arguing that their committee could better address the specific matter of child care. They attempted to persuade the administration to split the welfare reform legislation into two parts, with child care proposals going to Education and Labor, but they were not successful. The Dellenback proposal was introduced separately from the Administration's and without the Administration's approval or support.

Since the Brademas and Dellenback bills were comparable, after months of hearings, a compromise bill was agreed upon which incorporated the best features of each. At the end of 1970, just before the adjournment of the 91st Congress, the Brademas subcommittee reported the first comprehensive child development bill. It contained requirements for comprehensive programs for all urban and rural areas throughout each state, directing funds through a single state agency (with an exemption for the nation's six largest cities), and called for statewide service plans. The bill received unanimous support in the subcommittee, but at the last minute a coalition of civil rights groups and labor unions opposed it because of its funding mechanism. This opposition and the lateness of the session caused no further action to be taken during the 91st Congress.

In spite of the fact that the time appeared to be right for congressional action, the circumstances had changed. By 1971, the concept of early childhood development and early intervention with a full range of services had apparently become accepted and no longer had to be sold; yet even with this achievement, the bill faced a very difficult future. Non child care issues such as service, delivery mechanism, locus of operating responsibility, and methods of distributing program dollars emerged as new problems which had to be reconciled before any legislation could be passed.

In following legislation, it is important to understand the evolutionary process and to recognize that factors other than those to which a bill is specifically directed (in this instance children) are often equally important, if not more important, to the outcome and final passage.

To illustrate, the original bill reported by the select subcommittee required a comprehensive state plan, which was to be composed of project plans and proposals which were to be developed by individual communities. For the sake of simplifying the funding process, all plans within a state were to be put into a single package, reviewed by the federal government, and funded at one time. It was felt that cities within a particular state, working with the state, would be better able to develop their own priorities and plans for meeting them if they were required to develop a single comprehensive approach.

It was in this context that the committee considered exempting major cities with a population of one million or more and allowing those six cities to be considered as "mini states" for the purposes of the Act, and to develop their own plans. It was argued that New York City, Los Angeles, Chicago, Detroit, Philadelphia, and Houston were so large and had so many complex problems that simply to develop a comprehensive program in those communities would be a monumental task, requiring, perhaps, that a major portion of the funds available to their states be spent just to carry out the cities' plans, and consequently depriving the remainder of the state of needed funds. By allowing those cities to be considered as "states" under the distribution formula, they would still have received a large share of the total allocation because of their populations, but the remaining areas of those states would have received a greater share of the total dollars than otherwise. As a result, funds would have been more equitably divided throughout the state.

The concept was sound, but when the bill was considered again by the subcommittee, some members asked, "Why one million? Don't cities with populations of 500,000 or more have the same problems?" Agreeing that they did, the subcommittee lowered the figure to include cities with a population of 500,000 or more, and raised the total number of eligible "mini states" to 19. The bill was unanimously reported by the select education subcommittee and contained this provision. (Because a bill may not be carried over from one Congress to the next, a new bill had to be introduced when the 92nd Congress convened. It was anticipated that the bill, previously unanimously passed by the subcommittee, would be reintroduced.)

During the period between the end of the 91st and the beginning of the 92nd Congress, another bill was developed with considerable input by the civil rights-labor union coalition. It differed from the subcommittee version in that states did not play a role; the cities became the major focal point as the state plan requirements and mini state concepts were eliminated. The bill totally disregarded the concerns which had originally been addressed—that the major cities have so many unique problems that they should be treated separately. The new bill had no population limitation, and allowed every city, county, village, or town to be eligible for funds and to deal directly with the federal government. It was on the matter of eligibility (Who would be eligible to apply for funds? and Who would have primary responsibility for program operation?) that the confusion and distortion of the problems of child care development legislation began; they continue to this day.

The confusion focused on the matter of who would receive program funds. Many felt that, unless the population limitation was eliminated and every jurisdiction made eligible, it would be a bill exclusively for big cities and states. The subcommittee was faced with the dilemma of resolving the original concept of treating large cities as states with the concern that unless the population figure was completely eliminated, most cities would be ineligible. Once again, the subcommittee worked out a compromise which set a population level of 100,000. Originally there were to be six "mini states"; under the new compromise there were to be 95. The term "mini state" was never used after that decision was made!

The population level, however, was merely one of the problems. Controversy also emerged over the actual delivery system and the entity which would be responsible for developing the plan, submitting an application, and becoming the "prime sponsor." The delivery system became so complicated that many congressmen who were early supporters of the child development legislation eventually changed their positions and opposed the bill, arguing that with the new mechanism it would be difficult for any geographical area, regardless of size, to comply with the requirements. Many representatives could not even understand what the bill actually did or how the delivery system actually worked.

In the process of compromise, even a simple concept can become confused and complicated when the pressures, pushes and pulls are great enough, and when attempts are made to satisfy the many vested interests involved.

Circumstances, timing, personal interpretations, vested interests, understandings, and misunderstandings all play a role in the final outcome of any legislative proposal.

As opposition to the child development bill continued to grow, many congressmen argued that the new legislation was not needed. Some supporters of the bill contended that if the controversy became great enough, Headstart and, possibly, the Office of Economic Opportunity could be destroyed. The following chain of events illustrates why the 1971 version of the bill generated so much opposition.

June 21, 1971. The select education subcommittee, as it had seven months earlier, unanimously reported a child development bill. Although it passed the subcommittee unanimously, it was another matter when it reached the full committee. There were a variety of forces at work, all with different purposes. Some members wanted the bill as reported by the subcommittee in June, others wanted the bill as reported in 1970, and still others wanted no legislation at all.

September 8, 1971. The full Education and Labor Committee reported its version of the Economic Opportunity Act without child development provisions.

September 9, 1971. The Senate passed an extension of the Economic Opportunity Act which contained a new Title V. This was the Senate's version of the Child Development Act.

September 14, 1971. The full Education and Labor Committee began consideration of the subcommittee child development bill reported on June 21.

September 23, 1971. The full Committee passed the child development bill, but did not file the explanatory report which normally accompanies every bill reported from a committee.

September 29, 1971. Floor debate began on the House version of the Economic Opportunity Act. Because it appeared that the House would have to go to conference with the Senate on the EOA without a position on the child development portion, the options were to (a) accept the Senate's child development bill as incorporated in Title V; (b) reject it completely and have no child development legislation; or (c) reduce the scope of the Senate's child development language. Because these options were unacceptable to most House supporters of the legislation, Congressman Brademas decided to offer the subcommittee bill that had been reported by the full committee with the 100,000 population figure, as an amendment to the EOA bill on the House floor. Those opposed to the bill, knowing Brademas' intent, prepared an amendment to his amendment which reduced the population figure to 10,000. That amendment was accepted by the House.

During the floor debate, one member attempting to put the matter in perspective, argued against lowering the population figure.

> If we drop below the figure of 100,000 to 25,000, we would be talking about 449 cities. If we go to a 10,000 population figure, it is possible that over 2,000 cities or counties or combinations of units of local government might submit applications directly to the federal government. It is conceivable that the federal government could receive applications for 10,000 to 40,000 facilities which do not yet exist. Simply trying to process all of the applications from an administrative standpoint is unmanageable. But more [important] than bureaucratic considerations, it does not bring about what we were striving for in the original bill: that is, coordinated child care/development activities on the local, state and federal levels. In the long run, I believe, opening up the door to all of these applications will not be in the best interests of the children we are intending to serve through this legislation, and the complications that will result from the confusion will actually hurt them.

The problems encountered by the bill can be attributed to the set of circumstances which led to the necessity of adding it, as an amendment, to the Economic Opportunity Act. However, it was the action of the House that day, more than any other factor, which created the climate for doubt and controversy and sparked some of the most violent opposition that many Capitol Hill observers had ever seen. The opposition occurred because there was no bill report to explain the Committee's intent; there were no copies of the 53 page amendment available on the House floor for members to read; because of the lack of time, there was little preparation or background information given to members prior to actual floor debate; there were many conflicting lobbying efforts aimed at members. In short, there was confusion in abundance.

October—November, 1971. The House-Senate conference held nine sessions.

During this period there was a most remarkable occurrence when a coalition of organizations and individuals came together to oppose enactment of the bill, but for totally different reasons. Some early Republican supporters of the bill changed their position and opposed it because of what they believed was an unworkable delivery system. Others opposed it because of the projected cost, which they estimated at $20 billion. A third group consisted, generally, of conservatives from both political parties who opposed the bill on the grounds that it was a total invasion of family life, which they felt would "destroy the American system of values by forcing children away from their mothers." Their position was greatly helped by the confused floor action and the unavailability of adequate explanations of the bill.

During the two months the bill was in conference, members of Congress were inundated by mail from home districts supporting or opposing the legislation, under great pressure from national organizations and by the threat of a Presidential veto. The situation was such that there were people with very rational reasons opposing the bill and urging defeat of the bill which emerged from the conference on one side, and the labor unions, civil rights, and child development coalition using equally rational and very persuasive, emotional arguments urging its passage on the other side. It appeared that everybody was lobbying for something (which is normal in Washington), but nobody appeared able to give definitive answers. Consequently, most congressmen were left frustrated. The bill, which just a few months earlier had unanimously passed the Select Education Subcommittee, now evoked highly emotional responses from all segments of society.

The situation was compounded by the press. The first and possibly the most damaging article entitled "Child Development Bill is a Monstrosity" appeared in the Washington Star October 24, 1971. In it, the noted columnist, James J. Kilpatrick, declared:

> No other word suffices. Many observers had expected, as a part of plans for welfare reform, to see some bill enacted that would provide modest federal subsidies for a few day care centers in major cities. These had been vaguely envisioned as places where welfare mothers could leave their children while they went off to work. Instead, the House has approved a breathtaking, fullblown plan for the comprehensive development of children to the age of fourteen. It is the boldest and most far reaching scheme ever advanced for the sovietization of American youth . . . .
>
> Doubtless the contrivers of this nightmare had good intentions. In the context of a sovietized society, in which children are regarded as wards of the state and raised in state controlled communes, the scheme would make beautiful sense. But it is monstrous to concoct any such plan for a society that still cherishes the values (however they may be abused) of home, family, church, and parental control. This bill contains the seeds of destruction of middle America; and if Richard Nixon signs it, he will have forfeited his last frail claim on middle America's support.

December 2, 1971. The Senate adopted the conference report 63 to 17.

December 7, 1971. The House adopted the conference report by a close vote of 210 to 186. The bill had been changed so much that many longtime supporters of the child development concept reversed their positions and voted against the bill. Congressman Quie (R-Minn.), a longtime advocate of child development education, summed up the situation when he said, "The bill is so unworkable that I would rather see no legislation passed at this time than to have this bill become the law of the land."

December 9, 1971. The President vetoed the bill.

December 10, 1971. The Senate sustained the veto 51 to 36. (Two-thirds are necessary to override.)

The goal of helping children, of doing something which would enhance their capacity for living, became as controversial and sensitive as any issue that has ever come before the Congress. It was timing and circumstances, rather than children (the subject of the bill) that guided the destiny of the legislation.

Child development legislation was seriously set back, and it was thought by many that it would take years before any new legislation would pass the Congress and be signed by a President.

January, 1972. The process began again when longtime supporters of child care legislation, Senators Mondale (D-Minn.) and Javits (R-NY), introduced separate bills aimed at correcting some of the "alleged" deficiencies of the bill vetoed by the President.

April 13, 1972. The Senate Subcommittee on Manpower, Employment and Poverty reported a compromise Mondale (D-Minn.), Nelson (D-Wis.), Javits (R-New York), Taft (R-Ohio) child development bill separate from the OEO extension. On June 20, 1972, the Senate voted 73 to 12 to pass an amended, compromise child development bill.

February 17, 1972. The House passed an extension of the Economic Opportunity Act, but did not consider a child development bill comparable to the Senate's. Instead, the House expanded the Headstart program by including the "fee schedule" (a minor provision) which was part of the bill vetoed the previous year. The House also doubled the Headstart authorization level for the next fiscal year and specified that 10 percent of the enrollment opportunities in the nation would have to go to handicapped children. All of these provisions became part of the final OEO bill signed by President Nixon on September 19, 1972. Although the Education and Labor committee passed a child development bill again in February, they failed, as in the previous year, to file the required report. As a consequence, the House took no action on child development legislation thereby killing the legislation for the 92nd Congress.

To this point, child development had become so complex and controversial that many felt that nothing else could happen that would create any further problems. But as a result of the expanded Headstart legislation, a new factor in the comprehensive child development controversy was added. The Education and Labor committee's report accompanying the OEO bill contained minority views, and although those views were not critical of the concept of child development, they did raise questions about the desirability and justification for expanding the Headstart program. More important, this was a signal that any future consideration of legislation on this subject would have to address a new factor: the role of the public schools rather than community based organizations as program operators and prime movers.

SUBSEQUENT ACTION

Although Congressman Brademas and Senator Mondale introduced identical bills entitled the Child and Family Services Acts of 1974, *it was almost two years before either House even considered the legislation again.* In August, 1974, the Select Education Subcommittee of the House and the Subcommittee on Children and Youth of the Senate held two days of joint hearings and heard from seventeen witnesses, but neither body took any action during the 93rd Congress.

In November, 1974, Albert Shanker, president of the American Federation of Teachers (AFL-CIO), launched a vigorous campaign to persuade Congressman Brademas and Senator Mondale to revise their bills to allow public schools to assume primary responsibility for preschool programs. Although Shanker campaigned hard during November, December, and January (1975), no revisions were made.

In the 94th Congress, Congressman Brademas and Senator Mondale introduced the Child and Family Services Act of 1975. Ten more days of joint hearings were held between February and July 1975 with 79 witnesses appearing before the committees.

The issues in 1975 were virtually the same as those of three years earlier: the delivery system (whether the schools or public non-profit community-based organizations would run programs); whether profit making operations would be eligible for funds; the formula (how the funds would be distributed to each state); the type of socio-economic mix that would be required; the extent to which funds would be earmarked to serve the handicapped children; and (certainly the most important) where the funds would be found to pay for the new program.

The witnesses appearing before the subcommittees included experts from the field, program operators, and a new and quite vocal force—the feminists. Since the original bill was first considered, economic conditions had changed considerably and more women were working than every before. There appeared to be a greater need for new child care legislation than ever before.

Witness after witness cited the pressing need for services. Their principal argument appeared to be that the number of women who were working was greater than at any time in the history of the country; in fact, the statistic most frequently cited was that, from 1948 to 1973 working mothers increased their numbers from 18 to 44 percent. In actual terms, it was estimated that 26 million children had working mothers, and of this total, 6 million were under 6 years old.

Between 1969 and 1972, the number of households headed by women increased by 60 percent. There was a 14 percent increase in the number of working women who had children under the age of six; 54 percent of all female workers had children between the ages of six and sixteen; two thirds of the women in the work force were single, separated, divorced, widowed, or had husbands who earned less than $7,000 a year. Witnesses argued that the sheer economics of today's world forced women to work; by necessity, they needed to find a place for their children during working hours. Witnesses stressed that even if they could afford to pay (and many could not), there simply were not enough facilities or services available. This meant that even when services were available, they were often so expensive that it did not pay for a woman to work because of the large cost involved in child care services. One witness claimed, "There is greater competition today to get a child into a day care program than there is to get a student into Harvard or Yale."

During the first six days of hearings, the consensus among the 65 witnesses was hostility and opposition to any role for funding eligibility for, or participation of proprietary operations in, child care services under the act. (This was despite the fact that many for-profit operations were and still are eligible to receive funding, although indirectly, from many federal programs, as subcontractors or through purchase of service agreements.) The chief opposition from both members and witnesses, however, was to giving primary responsibility for program operations to the public schools. Such a position stemmed partly from opposition to Shanker, but also from fear that traditional program operators would lose control. It appeared that a confrontation between Shanker and the Congress over the school prime sponsorship issue was inevitable, and Shanker was scheduled to testify in early June.

For more than a year, Shanker had been selling his case not only to Congress but to union leaders throughout the nation. Suddenly, on May 6, 1975, the *circumstances* surrounding prime sponsorship conflict took an unexpected turn. On that day the Executive Council of the AFL-CIO issued a statement on early childhood education and child care programs which represented a turn of 180° from their previously stated position. The statement read in part:

> Prime sponsors must be responsible elected officials. The AFL-CIO believes that there is great merit in giving the public school systems this prime sponsorship role.
>
> In most communities, the school system would be the appropriate prime sponsor of the child care and early childhood development program, with the responsibility for planning programs, distributing funds, and monitoring programs. Where the school system is unwilling or unable to undertake this responsibility in accordance with federal standards, some other appropriate public or nonprofit community organization should be eligible.

The AFL-CIO continued its total opposition to participation by for-profit operators.

On June 5, Shanker appeared before a joint committee session, and the hearing turned out to be quite restrained. It is safe to assume that had the hearing taken place one month earlier (May 5), the atmosphere would have been totally different. The AFL-CIO statement went a long way toward modifying attitudes of committee members regarding a role for the public schools.

Another factor appeared to modify congressional attitudes that day and dampen further enthusiasm for the legislation as much as the AFL-CIO statement on the schools had done. The day before the Shanker hearing, the House, with its overwhelming Democratic majority, failed to override President Ford's veto of the Emergency Employment Appropriations Act. If that bill, which would have provided approximately $5.3 billion to create a million jobs could not be overridden, then the prognosis for new child development legislation appeared bleak.

In spite of the pressing need to do something in the child care area about which he felt so strongly, Senator Mondale asked one question at the Senate hearing, which told the whole story:

> We have a problem. There is a projected budget deficit of $68 billion; the President has said that there will be no new programs started by the federal government this year; he says that he will veto any legislation which establishes new programs; there is also a question of where the money will come from to finance this program; there are, at the present time, many agencies already providing similar services to those we are considering in this bill; and there is a growing conflict as to who should be responsible for these programs authorized under this legislation—the schools, or community based organizations. In view of these factors, what would you advise the Congress to do? Should we (a) take no action on this legislation this year, (b) come up with a modified bill which provides technical assistance and training and some start-up costs, or (c) try to pass the best bill possible?

In 1975, it appeared that the opponents were better organized and working harder than the proponents, who were silent and appeared to have given up the fight.

In spring 1975, a reawakening of the 1971 opposition to the legislation began, soon becoming as vicious and intense as any that had come before the Congress in recent years. The opposition appeared to be based upon hearsay, rumor, and innuendo—but mainly, fear; it reflected the "big lie" that continued to grow. It seemed that those who were opposing the bill had never seen it, let alone read it. Many of the same arguments—such as those charging communal style living, the breakdown of the traditional family, and the sovietization of American children, that were used in 1971 attacks—were resurrected, plus a few new ones.

Organizations spontaneously appeared throughout the country to fight "the growing menace" of the Child and Family Services Act of 1975. Fliers were distributed. Ads were placed in newspapers, both in daily and shopping center editions. Ministers attacked the bill from their pulpits; newspaper and television editorials seemed to be cropping up everywhere. In Congressman Brademas' district, the pressure against the bill continued to grow. It was interesting to note that editorial writers simply took the information from the fliers, and did not bother to validate it before writing editorials. One sequence of events showed that the Warsaw Union Times ran an editorial deploring the bill. The following week, the Goshen News, in its October 22, 1975 edition, picked up the editorial verbatim and printed it in their "What Others Say" section. On October 25, 26, and 27, 1975 WSBT-TV in South Bend, Indiana ran the following editorial five times a day, and on WSBT radio October 27, 1975:

> Little Herbie Jones is ten. He belongs to Local 53 of the American Federation of Children's Union. He's about to file suit against his folks because they forgot to take him to the zoo last week. The folks are a little upset because they've already been hit by a restraining order that says Herbie can't be forced to attend Sunday school. In a companion ruling, a judge says the parents will be in contempt of court if they make Herbie take the garbage out one more time.
>
> Sounds stupid, doesn't it? But that's the language of a congressional measure now on Capitol Hill that is part of the overall Child and Family Services Act. The bill is being cosponsored by Minnesota Senator Walter Mondale and Indiana's Third District Congressman John Brademas.
>
> The overall intent of the bill is to provide protection for young people within the framework of the family unit. But buried in the measure are proposals that we feel threaten the family structure itself.
>
> For example, the measure reads, "All children have the right of protection from, and compensation for, the consequences of any inadequacies in their homes and backgrounds." Or how about this? "Children have the right to protection from any excessive claims made on them by their parents or authority."
>
> Another gem in the bill says, "Children have the right to freedom from religious or political indoctrination."
>
> In a paragraph that reads like a labor union contract, the bill proposes that children shall have the right to make complaints about teachers, parents, and others without fear of retaliation.
>
> And in their final stroke, the bill's authors suggest that "The government shall exert control over the family because we have recognized that the child is not the care of the parents, but the care of the state."
>
> While we recognize that some legislation may be needed to insure that children receive every opportunity possible for a decent start in life, we urge Congressman Brademas to seek the elimination of these incredibly naive parts of the bill.
>
> After all, we wouldn't want anybody to think the Congressman hadn't been raised properly.

The South Bend Tribune, Sunday, November 2, 1975, contained an article in which Congressman Brademas refuted these allegations. The article read in part:

> Congressman John Brademas has been the victim of a political "dirty trick" which apparently resulted in erroneous statements in a WSBT television and radio editorial about a bill Brademas is sponsoring.
>
> The dirty trick involves distribution of an unsigned leaflet attacking the proposed Child and Family Services Act and containing false statements about the intent of the measure and "children's rights" which it allegedly would provide.
>
> While the bill is controversial, it contains none of the "children's rights" sections quoted in the leaflet, and cited in the broadcast editorial and in newspaper editorials printed in Warsaw and Goshen.
>
> Brademas said Saturday that the leaflets were being circulated in northern Indiana in "a deliberate effort" to spread false information in tactics similar to those of Watergate fame.
>
> "Never in my 17 years as a representative in Congress have I seen a more systematic, willful attempt to smear both me and my work in the House of Representatives," Brademas said.
>
> Quotations in the leaflet about so-called "children's rights" to "make complaints about teachers, parents and others without fear of reprisals" appear nowhere in the bill.

On November 8, 9, and 10, 1975 WSBT-TV and WSBT radio aired the following retraction:

> TV 22 recently aired an editorial dealing with a bill before Congress known as the Child and Family Services Act whose prime sponsor in the House is Third District Congressman John Brademas.
>
> In opposing the bill, we cited several provisions which we were led to believe were contained in the House measure. Those statements dealt with allegations that the bill somehow would take parental control away from the family and give it to governmental agencies, and that children would have legal recourse against undue demands by parents or other authorities.
>
> In fact, those specific provisions are not contained in the bill. The measure does contain a statement that the family is the primary and most fundamental influence on children and that services offered under the bill are intended to strengthen the role of the family and are provided on a voluntary basis to parents who request them.

> The information which formed the basis for our original editorial came from material put together by vigorous opponents of the bill . . . a group that Congressman Brademas claims is out to smear him through a campaign of political dirty tricks.
>
> Our editorial certainly was not intended to play into the hands of any group. We would never do that. It was simply a case of not doing proper research. For that we apologize.
>
> Because credibility is our business, it is important for us to be right. When we're not, we'll let you know.

In spite of the retraction in Congressman Brademas' district, the word apparently failed to spread across the country. By December 1975, members of Congress were still receiving as many as 300 letters per week in opposition to the Brademas-Mondale bills.

As 1975 came to an end and the bicentennial celebration began, the supporters of the child development legislation appeared content to let the opposition to this bill control the circumstances and, possibly, its future course.

The circumstances surrounding the evolution of this legislation are unfortunate. The work done by the Congress recognized that child development was and is an area of great national importance and need. Many things need to be done, but it appears that the obstacles which will have to be overcome are so extensive that it will be many years before the damage done during the last years is healed. Even if legislation is passed, it is questionable as to just how meaningful it will be. The more compromises made, the more disclaimers written, and the more the concepts are watered down to satisfy all interested parties, the more doubts will be raised as to how much the legislation is actually needed. The future of child development promises to be as stormy as its past.

As this chapter was being completed, it was impossible to write an ending because of the uncertainties as well as the times and circumstances that prevailed. There was no way of predicting whether any bill would be reported from the Congress during 1976 or within the next five years. It was ironic that those who worked most closely on the legislation were certain that the 94th Congress would be more receptive to legislation for children than any of the preceding Congresses. It was felt that the lines were drawn between the executive and legislative branches and that only the size of the majority with enough votes to override a presidential veto was necessary.

In 1974 the Congressional leadership decided to wait until there was an overwhelming majority sufficient to override. The 1974 elections produced that majority. Circumstances in 1974 also eliminated the strongest opponent to the legislation—President Nixon. There is no way of anticipating what President Ford's attitude will be on the merits of the issue of child care or child development should a bill ever emerge from the Congress. What is clear, however, is that in spite of the majority in both houses of Congress, the prime issue determining whether legislation will be passed or vetoed in 1976 is—in view of the problems this nation is facing because of inflation as well as the large federal budget deficit—money.

The circumstances keep changing and changing and changing and . . . .

FINAL PRAGMATIC THOUGHTS

It is not enough simply to "be concerned." You must personally be involved.

You cannot be all things to all issues. You must concentrate on the item that you want to change. You cannot be against defense expenditures one day, for cleaning up the environment the next, serving on a PTA committee the day after that, and expect to make a difference.

Pick your targets, study them thoroughly and try to understand what is possible to achieve. Do not focus on symbolism. Be concerned with substance, not form. You can't buy anything with a "moral victory."

Be prepared to spend one, two, three or more years on a single undertaking with the possibility that you may not win everything (or anything) that you seek.

Commitment is a word which we hear everyday, but commitment is more than a philosophical dedication to an idea or concept; it means time, effort, skill, daring, sensitivity, patience, and money to be successful.

You may want to change some things which are simply too large to tackle at one time or too large for one person. Work with others and take a piece at a time. Ultimately, your determination, *timing* and *circumstances* will be the deciding factors in your success.

A. B. HARMON

The Kentucky Right to Education Litigation

□ Examination of Kentucky Revised Statutes regarding the education of exceptional children reveals that many laws have been passed as the result of the efforts of groups interested in a variety of handicapping conditions. This writer became directly involved in this process when he was appointed legislative chairman of the Kentucky Federation of The Council for Exceptional Children in January 1970.

In 1970, the governor of Kentucky proposed a budget for the 1970-72 biennium that contained no provision for increasing programs for exceptional children. To counter that proposal, the Kentucky Federation of The Council for Exceptional Children mounted an extensive legislative effort. The federation organized ad hoc advisory and action committees, wrote proposed legislation and found sponsors for it, appeared before Senate and House committees, lobbied for passage of the bill, saw the bill successfully pass the House and Senate—then saw their efforts die with the governor's veto. The veto, however, was the result of a variety of political factors, not solely a rejection of the needs of handicapped children. In fact, the funding required to give life to the bill for the handicapped would have come from dollars unspent if another simultaneous bill had been passed that would have delayed school entrance to regular first graders.

Despite the failure of the bill to be enacted into law, the Federation learned many important political lessons, especially through experiencing the difficulties of bringing pressure to bear on elected representatives from diverse sources. In particular, the necessity to build a broader base for legislative support from among all groups interested in exceptional children became apparent.

ORGANIZATION OF A COALITION

Prior to October 1973 little formalized effort had been made to combine the energy of various interest groups into united legislative effort for exceptional children. In that month, the Kentucky Commission on Children and the Youth Advocacy Project for Exceptional Children arranged a delegate assembly and invited all groups interested in legislative reform and new legislation for exceptional children to attend. During the session, the 23 groups who attended reviewed existing legislation to determine needed revisions and to establish the need for new legislation. From this assembly a united group, focusing on goals of new and revised legislation appeared to have been born.

During the time between the delegate assembly and the beginning of the 1974 biennial session of the Kentucky Legislature (January 1974) the delegates shared the outcomes of the assembly with their parent organizations and gathered or lost support for the remaining legislative tasks. As the 1974 session of the legislature convened, the interested groups visible in the marble halls of the capitol were the Kentucky Federation of The Council for Exceptional Children, the Kentucky Association for Retarded Citizens, the United Cerebral Palsy Association of Kentucky, the Kentucky Association for Specific-Perceptual Motor Disability, and several interested parents.

Consideration of the proposed goals of the groups and the scope of their required activities occurred with clear awareness of the events of the 1972 session of the Kentucky General Assembly. A look at this legislative session leads to the most important part of this chapter.

The history of the 1972 session of the Kentucky General Assembly may be summarized by saying that two conflicting legislative actions were passed; one gave unlimited expansion to programs for exceptional children where needed and the other limited the growth of programs for exceptional children to 150 units (classes) in 1972 through 1974. This conflicting legislation led to a debate among the Governor, Superintendent of Public Instruction, and the Commissioner of Finance. A summary of significant events subsequent to the legislations' passage is as follow:

1. In the 1972 session, the Kentucky General Assembly passed the self generating formula bill Senate Bill 103, which applied to the provision of special education for all exceptional children. Articles appeared throughout the state apprising the public of the passage of the legislation and commending both the legislature and the administration for their progressive action in recognizing and providing for the educational needs of all children in Kentucky.
2. In March 1972, at the spring meeting of the Kentucky Federation of The Council for Exceptional Children, the state school superintendent encouraged special education administrators to employ certified and qualified teachers as needed, since funds would be found for their classes.
3. On July 18, 1972, all school superintendents were told that the state department of education had a plan to reallocate funds from other categories in the Minimum Foundation Program for the requested special education units and that a ruling as to the legality of such an action already had been requested from the attorney general.
4. On July 24, 1972, the attorney general ruled that funds could be reallocated by the state school superintendent with the approval of the commissioner of finance. In rendering this decision he pointed out that the Constitution and statutes stressed the responsibility of the General Assembly to provide an efficient system of public schools throughout the Commonwealth and that language in the state budget specified that the total appropriation for the Foundation program shall be measured by estimates pursuant to the statutes. It was his opinion, therefore, upon consideration of the mandate of the implementing statutes concerning public education and the new language of the Special Education Law (S.B. 103), that the General Assembly intended to depart from any limitation otherwise written into the state budget as to exceptional children, subject, however, to the total Foundation Program allotment. In other words, through S.B. 103 the lawmakers were passing landmark legislation which would give equal status to programs for exceptional children but limited funding (authorizing a specific number of growth classes).
5. On August 2, 1972, the commissioner of finance ruled differently. He held that the attorney general's opinion did not accurately reflect the intent of the General Assembly and that the Appropriations Act, which provided for 150 new units only, took precedence over S.B. 103. Therefore funds for 150 units only would be approved.
6. On August 4, 1972, all local superintendents were sent a letter advising them of the decision of the commissioner of finance and informing them that a formula would be developed to allot the 150 units in a fair and equitable manner. By this date, however, the majority of the school districts had already contracted for additional special education teachers. At this point, numerous special interest groups concerned with exceptional children, school administrators, teachers, and parents began to meet to consider what might be done to alter the commissioner's decision, and, if nothing, to give consideration to the filing of a federal law suit.
7. On August 14, 1972, representatives from the Kentucky Federation of The Council for Exceptional Children, the Council for Retarded Citizens, the United Cerebral Palsy Association of Kentucky, and interested citizens sent a letter to the governor requesting a meeting to discuss the matter. (This group of loosely connected organizations which at the time operated on an ad hoc basis ultimately became the nucleus of the Action Committee for Exceptional Children. This was also the beginning of the group effort that pursued the litigation.)
8. On August 18, 1972, the meeting was held without the governor, who was ill. In attendance at the meeting were the commissioner of finance, the commissioner's legal adviser, the governor's assistant, the state school superintendent, and representatives of several concerned organizations.

The results of this two hour meeting were negative. The commissioner remained in disagreement with the ruling of the attorney general; no monies would be transferred from other categories, and appropriated funds would be distributed on an equal basis to fund, at least partially, all new units for which contracts had been made. This meant that any new special education units would be funded 40% by the state and 60% by local districts, as opposed to 100% by the state, as would have been the case if S.B. 103 had been implemented as passed. The school districts were told, however, that if they had ESEA Title I monies, those funds could be used to make up their 60%, although by so doing, they would have to drop any projects for which that money was originally intended.

Many people (including legislators) interpreted accounts of the meeting to mean that the state was willing to pay 40% of the costs of the new units. On the contrary—these were not additional funds, but merely the amount previously set forth in the budget. Moreover, Title I funds were already being used at this time to provide programs for exceptional pupils, because of a limitation of state funding and a shortage of classes throughout the Commonwealth. The shifting of Title I funds to cover the loss of state funds for exceptional pupils meant that remedial reading, remedial math, and other compensatory classes would have to be reduced. (Since the supplanting concept was a new doctrine locally and not fully implemented, the legality of this shift was never questioned. Under present Title I rules, however, such an action would be illegal.)

9. On August 18, 1972, immediately after the meeting, another letter was sent to the governor to request a personal meeting in the hope of obtaining a solution or his assistance, at least. It was felt that every effort should be made to work with the administration and the department of education to solve the problem before the possibility of federal legal action was further considered.
10. On September 11, 1972, a meeting was held with the governor which produced no basic change in the situation. Moreover, the group was unable to obtain any assurance that the situation would change in 1974 or that weighted units (another alternative for funding) would be considered. It further learned that it would be financially impossible to implement the 1970 mandatory education bill which provided:

> By July 1, 1974, all county and independent boards of education shall operate special education programs to the extent required by, and pursuant to, a plan which has been approved by the State Board of Education after consideration of the recommendations from the State Task Force and the Human Resources Coordinating Commission and Council. If any county or independent board of education has failed to operate and implement special education programs in accordance with the aforesaid plans, the application of said county or independent board of education for minimum foundation payments may be considered insufficient. (Sec. 157.224, KRS)

Further, in response to a request from State Superintendent Wendell Butler to clarify the intent of the act, the state attorney general wrote that since the act contained the word "shall," it was his opinion that it was mandatory for "local boards of education to operate special education programs for exceptional children by July 1, 1974." (February 11, 1970)

THE DECISION TO LITIGATE

After encountering such "brick walls," various groups and individuals met informally to continue to consider the possibility of legal action. By this time, every effort had been made to obtain an equal educational opportunity for exceptional children through legislative efforts, through negotiations related to those legislative efforts and through the cooperation of "men in power." Since all of these approaches had failed, this informal coalition agreed to organize, employ legal counsel, seek financial support and bring legal action against the Kentucky state board of education and the superintendent of public instruction, an unprecedented action in Kentucky, although one encouraged by similar action in other states. (It should be noted that this action marked the first formal participation of a federation of The Council for Exceptional Children in a legal action against a board of education.)

The group considered incorporating for the purpose of filing legal action against the state, but when legal counsel pointed out that all members were or could become members of an incorporated group, it was decided to organize for action as a representative committee. A chairman, a secretary, and a treasurer were elected at the initial meeting and policies, procedures and operational plans were soon established. Requirements for group membership in the committee included agreement to support the legal action financially, to name and maintain a delegate to the committee, and to identify a child from the interest group whose parents would allow the child to be a plaintiff in the suit. After the decision to formalize the group, there was immediate action to do so; shortly thereafter sufficient funds were raised to hire an attorney. The organizations that ultimately joined the Action Committee for Exceptional Children included the Kentucky Federation of The Council for Exceptional Children, the Kentucky Association for Retarded Children, the Owensboro Council for Retarded Children, the Council for Retarded Children of Jefferson County, the United Cerebral Palsy Association of Kentucky, the Kentucky Parents of Children with Communication Disorders, the Jefferson County Association for Children with Learning Disabilities, the Cerebral Palsy School of Louisville, the Greater Louisville Council for the Hearing Impaired, and the Northern Kentucky Association for Retarded Children.

On March 23, 1973, the Action Committee first reviewed a draft of the legal brief that was to be revised and finally filed on September 12, 1973, in the United States District Court, Eastern District of Kentucky at Frankfort. Although research on the draft was done by the group's attorney, advice was obtained from the University of Kentucky Law School (Robert A. Sedler); The National Center for Law and the Handicapped, Inc., South Bend, Indiana (Bob and Marcia Bergdorf); and The Council for Exceptional Children (Alan Abeson).

THE LITIGATION

The Kentucky Association for Retarded Children et al. v. Kentucky State Board of Education et al. (Civil Action No. 435 E.D., Ky., filed September 12, 1973) is the class action right to education suit that was finally filed against the Kentucky board of education, the state superintendent, and the Fayette County board of education and its superintendent. The suit was brought specifically on behalf of "exceptional children" who met the statutory definition to be so categorized and who were

> (1) excluded from the public schools of the state of Kentucky; (2) excused from attendance at public schools of the state of Kentucky; (3) otherwise denied education or training suitable for their condition in the public schools of the state of Kentucky; (4) or otherwise denied education or training suitable for their condition by agencies or instrumentalities of the state of Kentucky, and consequently have been (a) denied a free publicly supported education suited to their needs . . . or (b) are enrolled in certain 'programs' which do not provide education suited to the children's needs.

Nine school age children involved singly or multiply with mild, moderate or severe mental retardation; blindness; deafness; physical handicaps; speech defects; or immaturity coupled with a lack of communicative skills were the named plaintiffs. The Fayette County board of education was named in the suit as representative of the approximately 190 county and independent school districts in Kentucky.

In essence, the complaint argued that free public education, where the state has undertaken to provide it, is a right that must be made available to all on equal terms. It was alleged in the suit that deprivation of that right with regard to the plaintiff children was a violation of the equal protection clause of the 14th Amendment of the US Constitution. Specific issue was taken with Kentucky statutes that required local school boards to exempt from compulsory education children "whose physical or mental condition prevents or renders inadvisable attendance at school or application to study" and any child "who is deaf or blind to an extent that renders him incapable of receiving instruction in the regular elementary or secondary schools, but whose mental condition permits application to study." In the case of deaf or blind children who are in the latter category, the state superintendent "may cause such children to be enrolled at the Kentucky School for the Blind or the Kentucky School for the Deaf."

The complaint also charged that those institutions were "extremely secretive and refused to accommodate all the children who wished to attend them" resulting in a total denial of a public education for some of those children. It was further charged that the statutory planning requirement: "by July 1, 1974, all county and independent boards of education shall operate special educational programs to the extent required by, and pursuant to a plan which has been approved by the State Board of Education "actually gave the state board" complete discretion . . . to approve a plan which provided for no programs for any of the classes of children represented by the plaintiffs herein or which fails to provide for all the classes of children represented by the plaintiffs."

The plaintiffs also charged that the exclusion of exceptional children from public school was arbitrary, capricious, and irrational, and that it constituted invidious discrimination. Further it was argued:

> There is no compelling state interest nor even any rational basis justifying the defendants' exclusion of the plaintiff children. In addition, any classification imposed upon the plaintiffs is suspect in that they have been saddled with such disabilities, subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Charges were also made that in the process of excluding children from public school, little or no procedural due process was provided to the plaintiff children or to their families.

Included in the claims for relief sought were the following:

1. The court would issue declaratory judgements that once Kentucky had undertaken to provide public education, it must be made available to all children "regardless of their physical, mental, or emotional condition" and that all school districts must provide programs for these children.
2. The court would declare unconstitutional that law which classified some children as incapable of benefiting from education.
3. The court would declare that provision of education to deaf or blind children in the state residential schools is not satisfactory.
4. The court would declare that no child may be excluded from regular school programs on the basis of classification as "incapable of participating in the regular program" without providing to the child and his parents full hearing and timely and adequate review of his status.
5. The court would issue a permanent injunction requiring the state and its district to develop plans to serve all plaintiff children and their class by September 1974 as a condition to receive minimum or other state funds, to identify all children, and to establish a full hearing and timely review procedure for all children "considered by school officials to be incapable of participating in the regular program of instruction."
6. The court would appoint a master.

On October 24, 1973, the state in its answer to the complaint offered nine defenses to plaintiffs' charges and requested the court to dismiss the suit. Among the defenses presented by the state were:

1. That the state was presently "endeavoring to obtain additional and improved educational services for exceptional children."
2. That the state did not have equal obligation "to provide a free public education to all children."
3. That "the 1974 General Assembly would enact legislation and appropriate funds which will have a direct bearing upon the claims asserted by plaintiffs in this action."
4. That "the complaint fails to state a claim upon which relief can be granted."

Once the suit was filed, extensive activity began inside and outside the court. Within the court, interrogatories (extensive lists of questions about the issues being litigated) were filed by both sides. Outside the court, the action committee was receiving advice to withdraw the class action portion of the suit; to limit the entire action to the state board of education and the state superintendent of public instruction, thus releasing the representative local Board of Education and the representative local school superintendent; or to settle via a consent agreement out of court rather than to bring the case to trial.

THE CONSENT AGREEMENT

The action committee considered two chief factors that finally led to a decision to agree to an out of court settlement. First, it was obvious that the pending litigation hung over the 1974 session of the state legislature like Damocles' sword. The lawmakers, with the urging of the superintendent of public instruction and the consent of the governor, passed open ended funding for exceptional pupils' programs. Moreover, with the assistance of the action committee the legislature rewrote the exclusion law to require that every excluded pupil must receive at least the services of a home instructor. Finally, they upgraded the certification requirements of teachers of exceptional pupils.

The second factor was the fact that the legal counsel for the defendants was a former governor, the father of a handicapped child, and a person who communicated openly with the legal counsel of the plaintiffs. The rapport that characterized the relationship between counsel communicated the willingness of the defendant (a) to agree that the handicapped were being denied a free public supported education, (b) to conduct an annual screening process to locate the handicapped, and (c) to enforce the provisions of the 5 year plan, including provision of due process hearings. Thus, time, legislative action, and the apparent agreements achieved with the plaintiffs led to the conclusion that an out of court settlement would achieve our goals, cause less injury to the pride of the defendants, and be less costly.

Although not a deciding nor even an influential factor in the settlement, the fact that during the life of the litigation several of the persons involved were targets of direct or indirect punitive action must be mentioned. For example, members of college faculties were reached through their presidents, deans, or department heads and advised to disassociate themselves with the litigation; a staff member of one of the participating agencies was fired; the superintendent of a public school employee active in the suit was called by a high state education official with a request to limit the employee's activities because he was trying to "run the state department of education and cause changes that couldn't be financed."

On November 12, 1974, Federal District, Judge Mac Swinford entered a judgment in the case of *Kentucky Association for Retarded Children et al. v. Kentucky State Board of Education et al.* The judgment approved a consent agreement filed by all parties to the lawsuit which the judge noted "sets forth a comprehensive program" for implementing educational opportunity for exceptional children in Kentucky. The terms of the agreement required that the state board of education enforce all state laws and regulations, as well as the consent agreement itself throughout the state, with particular attention towards the 5 year plans for special education submitted by local districts. The state board agreed to withhold state education funding from any district not making a good faith effort to provide for the needs of exceptional children pursuant to its particular 5 year plan.

In addition, the board was required to establish guidelines by which all local school districts would identify exceptional children not presently enrolled in their district. Local districts were required to notify the parents of the child's right to an adequate education and to communicate such notification and identification to the state board. A modified hearing procedure was provided under the agreement through which parents of an excluded child or a child for whom no local program exists will receive information concerning all available programs for their child, and concerning the local school district's responsibilities regarding the child's education. A modified right of appeal is provided to such parents in the event their child is not provided a local program, in order to coordinate various special education programs available for the child outside the state.

RESULTS OF THE AGREEMENT

After the consent agreement was approved, it appeared that, for the first time, the state department of education began to take seriously the needs of exceptional pupils and the voices of their advocates. The state superintendent reminded all school attendance officers and superintendents that truancy laws applied to exceptional children as well as nonhandicapped children since it was implicit in the settlement that exceptional children are covered by compulsory attendance laws. He further told local superintendents that they must provide for *all* and that state funds would be available for the employment of qualified teachers in all areas of exceptionality.

Members of the action committee feel that another major impact of the consent agreement was that it compelled the state board of education to align its work with the results of this and other litigative efforts across the nation. Clearly, the filing of the suit caused the state superintendent to review other legal proceedings across the nation as they benefited exceptional pupils.

Shortly after the initiation of the suit, the superintendent of public instruction and the state board of education elevated the division of special education to the status of bureau of exceptional children (July 1, 1974), providing a new bureau chief, additional staff, and new office quarters. In establishing the bureau for exceptional children, the superintendent went back to a law passed in 1970 which required that such an agency be established but failed to provide funds for that purpose. It was interesting to note that while a former superintendent of public instruction and two previous governors could find no funds to establish the bureau, somehow in January 1975 it was accomplished without enabling legislation.

One of the immediate effects of the consent agreement was its inclusion in new state regulations, directives, and in the state plan required by the Bureau of Education for the Handicapped of the US Office of Education (P.L. 93-380)for Kentucky's continued receipt of federal funds for the education of handicapped children. Specifically, included in the state plan was the following:

> **Because of this State's previously adopted commitment to provide full educational opportunities to all handicapped children of compulsory school age as exemplified in the Consent Agreement, approved by the Court in Civil Action No. 435, titled *Kentucky Association for Retarded Children, et al., v. Kentucky State Board of Education, et al.* . . . . *the State Board's policies and procedures regarding expenditures of state and local funds for programs for exceptional children are directed at meeting this commitment. Policies and procedures regarding expenditures of federal funds under this Act are directed at meeting the commitment of providing full educational opportunities to all handicapped children and youth.***

Additional specific policies focusing on nonexclusion, due process, least restrictive alternative placement principle, and nondiscriminatory evaluation and placement are now included in state regulations.

The Action Committee for Exceptional Children, via the law suit, accepts responsibility or credit for all of the above accomplishments. At first, the committee was disappointed at not being subpoenaed to testify as was originally planned, nor to see the defendants confronted in court and thus to gather publicity on behalf of exceptional children. Wisdom prevailed, however, as victories were assessed during the long period of the pending litigation. Members of the committee found it necessary to explain many things to their respective organizations about the gains and losses of the litigation and subsequent consent agreement. (The total cost of the legal action, including two lawyers' fees was $12,353.52.)

The Action Committee for Exceptional Children has continued to meet and to assume the role of advocate. Since it holds ready a planned course of action (litigation), it needs only a reluctant board or a denied child to reenter the court and test the agreement. The Committee is also pursuing public dissemination of the agreement through the press and through the publication of a pamphlet.

IMPLICATIONS OF NEW POLICIES

For children. For the first time, exceptional children in Kentucky are assured their right to an educational opportunity at state and local expense, a right which nonhandicapped children have long enjoyed. It means also that children are coming to school, staying in school, and are allowed to feel "I am someone."

For practitioners. Teachers, therapists, clinicians, consultants, supervisors, and administrators now have support, "clout," direction, and an opportunity to educate. They can demonstrate that Kentucky's handicapped citizens can become productive citizens and can take their rightful place in society. Educators now have the professional obligation to monitor the quality of educational offerings for exceptional pupils, to update the certification requirements of teachers, and to improve the undergraduate, graduate, and inservice training programs of teachers of exceptional pupils.

For parents. Parents in both the populous and the remote areas of the state now have an instrument, a method, a legal provision to use if and when education programs are denied their exceptional child or when services offered do not meet the needs of their child.

For other groups. Other groups such as Councils for Retarded Citizens, United Cerebral Palsy Associations, can now leave the direct provision of education for handicapped children to the public sector, and turn their attention to fulfilling other advocacy responsibilities.

While the consent agreement requires only educational opportunities for exceptional pupils, these children are also in need of occupational and physical therapy services, audiological services, medical services, prosthetic services, special transportation services, special physical adaptations, as well as counseling and other ancillary services often not provided under education programs. These groups must continue to demand that such services be included as a part of educational programs for all exceptional children.

A Personal Note

In conclusion it can be said that the committee was initially delayed in the litigative process by not having legal counsel fully informed on exceptional children's programs and needs, and the required legal knowledge to bring a successful lawsuit. In other words, much time was spent (but not lost) in our "educating" our legal counsel, and in our counsel educating us about the legal process. However, as a result of our mutual efforts, we are now more knowledgeable; we now have a local lawyer trained so that reentry to the courts is already planned and easily accessible. If the task were to be done again, I would press harder as a plaintiff, require more attention to the pursuit of the case by the lawyer, rely more heavily upon the governmental relations unit of The Council for Exceptional Children and upon the National Center for Law and the Handicapped. Nonetheless, what has been reported was a most rewarding human experience: to have been a part of the greatest growth of programs for exceptional pupils in the Commonwealth and to see these exceptional citizens be given an equal educational opportunity for the first time.

DAVID P. RILEY

The Ins and Outs of Legislative Reform: Vermont's S. 98

☐ Legal reform, whether created by judicial or legislative action, usually encompasses a myriad of philosophical, political, and economic issues. The resulting policy develops out of a process involving the interaction of many individuals, groups, and circumstances, both inside and outside the courtroom or the legislative chamber. To understand and conceptualize the nature of the legal reform process in an area as complex as education for the handicapped is a difficult task.

On March 13, 1972, Governor Deane C. Davis of Vermont signed into law a bill which set in motion a plan to guarantee an education to all handicapped children in the state. Adoption of the law was the culmination of more than two years of lobbying efforts by a statewide organization of parents and professionals. A post hoc study of that reform movement was conducted in an effort to gain insight into how one group of citizens effectively worked through the legislative process.

LEGISLATIVE HISTORY

Vermont's legislative chronology of support for the education of handicapped children mirrors the history and trends affecting that group nationally. During the early 1800's the General Assembly passed legislation providing for the education of the deaf, dumb, and blind. In 1872 an annual expenditure of up to $2,000 was authorized for the training and instruction of some of the state's handicapped at the Massachusetts School for the Idiotic and Feebleminded. The Brandon Training School was established in 1912 by an *Act to Provide for the Care, Training, and Education of Feebleminded Children.* All these laws were implemented with a greater emphasis on institutionalization than on education. The first Vermont law enabling the department of education to provide special education facilities and instruction for handicapped children was passed in 1953.

The greatest proliferation of publicly supported special education programs following the passage of the 1953 act came in the field of mental retardation. Three years after the implementation of the act's provisions, 12 special classes were opened for the mentally retarded with a total enrollment of 191 children. By 1960, the number of such classes had almost doubled and 310 children were being served. In reality, these classes were quasipublic. They were organized and operated, consistent with the regulations and standards set by the department of education and the division of special education, by the Parents and Friends Organization, which was later to become the Association for Retarded Children.

In the mid 1960's, the state legislature amended the original act of 1953 in two significant ways. Where the 1953 law had established it as the policy of the state "to provide equal educational opportunities for all educable children in Vermont," a 1965 amendment deleted the qualifier *educable*. The beneficiaries of this change were those individuals classified as trainable mentally retarded. At the same time, the learning disabilities movement was maturing across the country and beginning to take hold in Vermont. The efforts of the state's newly formed Association for Learning Disabilities resulted in an additional amendment to the education of the handicapped law in 1967. The *Act to Aid Children with Learning Disabilities* provided $93,000 to support the creation of local professional teams for the diagnosis and education of learning disabled children.

With the growth of programs such as these and a reorganization of public school systems in 1966, the role of the state's division of special education expanded dramatically. While the state greatly controlled the pace of program development through its reimbursement practices, local districts became more involved in the assessment and placement of children as well as in the supervision of their own special education programs. The division of special education then shifted its operating role to one of consultancy and coordination, and its title was changed to reflect these new demands and foci.

Renamed the Division of Special Educational and Pupil Personnel Services, the division was charged with ensuring "that a program of comprehensive pupil services . . . . and a full range of instructional opportunities for children with handicapping conditions is implemented for pupils in Vermont schools" (State Board of Education, 1968, p. 11). The law under which programs were being offered, however, remained permissive, and state fiscal support, while growing incrementally since 1953, was failing to keep pace with the demands being made both by the amendments to the law and by a growing public awareness.

FIRST EFFORTS AT REFORM: H. 314

On April 1, 1969, State Representative John Alden of Woodstock introduced H. 314. This bill would have substantially altered the 1953 statute and established, administratively and fiscally, a service delivery system modeled after that legislated in Illinois. The idea for the bill surfaced after Alden (1974) had read a *Congressional Record* article which pointed out the education of the handicapped law in Illinois as being the "best in the nation at the time."

Alden obtained a copy of the law and submitted it to the legislative counsel's office for appropriate drafting. By the time the Woodstock representative formally presented H. 314 to the legislature on April 1 and had it referred to the House Education Committee for action, the legislative session had all but ended. While bills submitted to the legislature have a two year life span, the Vermont legislature generally meets only from January to early April of each year. Thus, no legislative action was possible on the bill until the following January.

The introduction of H. 314 did not go unnoticed within the professional special education community of the state. For more than one year people such as Jean Garvin, state director of special educational and pupil personnel services, Sister Janice Ryan of Trinity College, and Hugh McKenzie, head of the special education training program at the University of Vermont, had been informally discussing what statutory changes would be required if the state was to meet rising demands for services.

In October 1969, Ryan, as president of the Vermont Council for Exceptional Children (CEC), convened a meeting at Trinity College in Burlington to discuss the Alden bill. Invited to participate were the presidents of the various statewide organizations for the handicapped and others who were interested in the education of handicapped children. The meeting was attended by 15 people representing the Division of Special Educational and Pupil Personnel Services, the University of Vermont, the Vermont Association for Retarded Children (ARC), the Vermont Association for Children with Learning Disabilities (ACLD), and the Vermont Speech and Hearing Association (SHA).

Garvin led the discussion, reviewing the various sections of the proposed mandatory legislation and comparing it with Vermont's existing statute. The meeting closed with a suggestion that each organization "work out a plan in their respective organizations on how best to analyze the bill, suggest changes, disseminate information, and then meet again to coordinate efforts to lay the foundation for unified support of H. 314 at the appropriate time" (Ryan 1969).

The following month, Garvin (1969) prepared an in-depth analysis of the Alden bill, including its statutory and programmatic implications. Shared with members of the state board of education, school administrators, and prominent members of the statewide organizations for the handicapped, the memorandum included specific suggestions by the state director on what future directions she would encourage.

The state board of education endorsed H. 314 in February 1970 and stated that it supported "any study necessary to determine possible steps to be taken in planning for the full implementation of such an act."

H. 314 died in committee at the end of the legislative session. Representative Alden (1974) stated later that "there just didn't seem to be a particular push behind the legislation at that time to try to bring it out." Ryan, having completed her term as president of the Vermont federation of CEC, became chairperson of the organization's legislative committee. As such, she attempted to maintain whatever communication and cooperation had been established among the various organizations the previous October.

Work began immediately on redrafting H. 314. Meeting followed meeting during the spring and summer of 1970. Although all groups had been invited and encouraged to participate, slowly the number of individuals involved diminished to the original three: Ryan, McKenzie, and Garvin. McKenzie (1974) recalled:

> We tried very hard to pull in other people, but it would always be the same people at the meetings doing the work. We agonized over this. We invited them to come half a hundred times. Then it reached the point where we did not want to invite them. We had a year of history behind us, and we were getting down to the crunch, we did not want to go back over the same old grind with them.

It became apparent that the redrafting of H. 314 into an acceptable Vermont statute entailed the actual replacement of the bill. While vestiges of the Illinois law were incorporated into the new legislation, for all intents and purposes H. 314 was dead. The preparation of the new special education bill continued into the early weeks of 1971 with at least two drafts officially put together by the General Assembly's legislative draftsmen. These were shared with and critiqued by the various statewide special education interest groups, and a final draft was readied for introduction in mid February 1971.

The first session of the two year legislative session was fast approaching a close. By the time the draftsmen completed work on the final form of the bill, it would be mid March. The legislature would recess for the year by the middle of April. If any action were to be taken on the bill during that legislative term, the bill, once introduced, would have to get over some committee hurdles in a short period of time.

Having been elected state senator in the fall 1970 contest, Alden, a Republican, approached three fellow senators to be cosponsors: Robert Boardman and Thomas Crowley, both Democrats from Chittenden County, and Robert Simpson, a Republican from Orange County. While none of these men was on the legislative committees the bill would face, Alden felt that bipartisan sponsorship would provide the necessary initial attention. The bill, bearing the names of these four senators, was first read to the senate and referred to the Education Committee on March 19, 1971. The bill's number was S. 98.

S. 98: DEVELOPING MOMENTUM

The core ingredients of S. 98 and the ways in which it differed most dramatically from the 1953 statute were six:

1. *Essential early education.* S. 98 called for the development of preschool programs for handicapped children "for the early acquisition of fundamental skills."
2. *Mandation.* Where the 1953 law "permitted" the commissioner of education to provide for special education, S. 98 mandated educational services for all handicapped children by 1980.
3. *Due process.* S. 98 created a procedure whereby parents of handicapped children, or the children themselves, might appeal to the state board and/or the courts in cases of alleged misclassification or lack of services.
4. *Percentage reimbursement to school districts.* Local school districts would be reimbursed 75% of salaries and wages for personnel engaged in the education of a handicapped child.
5. *Local responsibility.* S. 98 placed responsibility for the education of handicapped children with the local school districts.
6. *Professional training programs.* S. 98 provided for state support of professional training programs through traineeships and fellowships.

With the introduction of S. 98, Ryan and her colleagues initiated an effort to have a public hearing on the bill before the conclusion of the legislative term. Friends, professional associates, and parent groups were encouraged to write, call and/or visit legislators requesting such a hearing. Letters flowed into the Senate Education Committee, and a hearing was scheduled for the last day of March. Chaired by Senator Ellery Purdy of Rutland County, the six member committee heard from a room full of S. 98 supporters for nearly two hours. Garvin opened by reviewing the bill's provisions, how it differed from the 1953 law, and the rationale behind the suggested changes. Others added their reasons for urging prompt and positive action by the committee. At the end of the session, it was evident what the trouble spots were going to be within the legislature: cost, mandation, and administrative/judicial due process.

At least three areas for study and action came out of the hearing:

1. An appropriation amount necessary to implement the provisions of S. 98 had to be considered and rationalized.
2. The year of mandation had to be reviewed and possibly changed.

3. A grass roots effort had to be organized and functioning for the upcoming legislative session.

This last point was highlighted by Chairperson Purdy's remarks near the close of the meetings:

> You need a good pressure group, like this one right here. If you thrust in on the local level and bring your organization up there, especially in some of the more backward districts, I think it will have an effect. Again, you are starting at the top with people here, certainly within this committee, who are 100% in sympathy with the need for the program. I hate to use that old cliche about the growing of the grass roots . . . but that is where so much has to start. (Vermont Senate Education Committee, 1971)

Planning began immediately and, at a late May meeting, Ryan, Garvin, and McKenzie outlined their activities for the summer months:

- Hold meetings with sponsoring senators.
- Prepare for a seminar in mid September to ensure geographic representation, organization and church representation, media representation, and political representation.
- Maintain communication with CEC members through the mails.
- Organize tours for senators at special education facilities in their home areas.
- Contact national CEC about its participation in the September seminar.
- Develop contacts with media for radio, television, and statewide newspaper coverage.
- Document and analyze the current status of special education services.

THE VERMONT COMMITTEE FOR THE HANDICAPPED

As a result of widespread media announcements and individual contacts, more than 75 teachers, parents, and students attended the September 18, 1971, Political Action Day at Trinity. Frederick Weintraub, director of national CEC's Governmental Relations Unit, opened the session with a hard-hitting talk on the rights of the handicapped to an education. Citing the *PARC* suit and the Alabama case of *Wyatt v. Stickney*, he warned that a reluctant legislature might find itself in a situation in which a court would appoint a monitor to search the state budget and find the money for a handicapped children's program.

The day's luncheon discussion centered on the problems of organization. Ryan (1974) recalled:

> The whole purpose of the day was to get people geared up for the thought of political action. As we were going to move into a legislative session, I, at least, did not have any clear notion of what that year was going to be like, other than the feeling that time was flying. We had a long talk with Fred Weintraub about how to take a weak state Association for Retarded Citizens, a struggling state Association for Learning Disabilities, and a CEC that was *comme ci comme ca* and present to the public the concept that it meant all of us. Really, a "coalition" was not the proper word for Vermont.

Weintraub (1975), in analyzing the political realities of Vermont, stated:

> Vermont is the kind of state where no single interest group can dominate; there are simply not the numbers belonging to a single group or interest. The legislature is controlled by rural interests. The traditional basis for power—population—does not exist. It was obvious that the group had to broaden its base. Such groups as the League of Women Voters, the truckers' union, and the like had to become involved. They needed to tap every local community to get the votes, and there was no way they could do that through state organizations such as CEC, ARC, or ACLD.

That afternoon, following a presentation by Garvin on the facts of special education in Vermont and general discussion with the program participants, Ryan announced that a new organization was about to be formed in an all out, grass roots effort to pass S. 98. The new group was to be called the Vermont Committee for the Handicapped (VCH).

Motivated by interest in special education and political action, two persons working for the University's special education area, Marcia Grad and Phyllis Perelman, joined the small coordinating group and assisted in the development of a county by county organization. Grad began contacting the media and organizations outside of special education to enlist support for S. 98. She also started planning for the county efforts. Lists of legislators, their addresses, and telephone numbers were put together by county. Special education groups were reached and their mailing lists copied.

Perelman was designated as legislative chairperson for the university's special education area and, as such, she set out to organize the 37 faculty, staff, and graduate students into a political force. Attempts were also made to have all college of education faculty and staff become aware of the content and implications of S. 98 and involved in contacting members of the Education and Appropriations Committees, opinion leaders, and anyone else who might be of help in getting S. 98 successfully through the legislature.

Grad (1975) reported later on the early efforts to organize the county groups:

> The concept of developing a structure for the VCH steering committee was rejected, and the decision was made to let it develop naturally to allow a maximum amount of flexibility. September and October 1971 were spent organizing pilot county groups in Chittenden and Rutland Counties and preparing for a November 4 legislative hearing. The tasks of the county groups were to begin collecting data about the need for improved special education in Vermont and to develop an organizational network for helping pass the bill into law during the upcoming legislative session.
>
> Many projects were considered by the two county groups, but most proved unfeasible. The most obvious failure was an attempt to organize a speakers' bureau, which was intended to reach a variety of organizations within each community with information on the bill. We discovered that it was more effective reaching interested individuals within the community than it was trying to persuade organizations to take action. Considering the limited time available, we operated on a strictly mini-max principle.

The pace of activity began to quicken. Bolstered by the editorial support of two of the state's newspapers, the S. 98 movement gained visibility and the VCH steering group orchestrated a large outpouring of supporters for the November 4 Senate Education Committee hearing. More than 250 people jammed the House chamber of the State House on that morning (there was not enough room on the Senate side of the capitol).

While many other presentations were made, the remarks of attorney Alan Sylvester of Burlington were found by the media to have the most impact. In the early part of October, a US federal court had served witness to a consent agreement between parties in the *PARC* case. Sylvester, the parent of a handicapped youngster, used the findings in *PARC* to give weight to his argument for passage of S. 98. In a summary of his remarks requested by the chairperson of the state board of education, the Burlington attorney (Sylvester, 1971) outlined the conclusion of his presentation:

> The consequences of the court order in Pennsylvania were complete and total chaos, confusion, and exorbitant, unnecessary expense. Any opportunity that the Commonwealth of Pennsylvania may have had for an orderly, logical, step by step process to provide an appropriate program of education and training for the mentally handicapped was rendered hopeless by the order of the court.
>
> The court made it obviously clear that when a basic constitutional right such as an equal educational opportunity is in issue, they will not be persuaded by languished cries of "no funds." Nor would the court tolerate any requests for an extended period of time in which to implement its order.
>
> It comes down to the issue of who will lead in the reform of the handicapped individual's basic constitutional right to a public program of education and training sufficient to meet his capabilities. Will it be the courts, as in the Commonwealth of Pennsylvania, or will it be with the department of education in collaboration with the executive department? It would appear the moral, legal, and ethical responsibility is, in the first instance, with the latter.
>
> When one considers the consequences of S. 98 or similar legislation not being enacted, to wit, court action, it is obvious that all efforts must be made to insure the passage of this bill. If it is not passed, it is certain that the state of Vermont and the state board of education will be faced with a situation similar to the one now confronting the Commonwealth of Pennsylvania and its department of education. I would anticipate that it would occur within a year.
>
> There appear to be two basic questions which the state board of education and the executive department must answer:
>
> 1. Does the state want an orderly, logical, step by step implementation of the necessary constitutional reforms as they pertain to education of handicapped children? If the answer is yes, then S. 98 must be enacted.
> 2. Do the state board of education and the executive department want to lead in this reform or do they want it imposed on them?

With the legislative hearing completed, efforts to inform and elicit the support of the state board of education were intensified. As state special education director, Garvin was requested by the state board to provide data outlining the fiscal and programmatic implications of S. 98. Garvin briefed the board early in November 1971. She estimated that the total sum required to implement the proposed law for the first year would be $398,000. Six target areas were identified and detailed as to implementation procedures, personnel needs, and costs. The general categories were as follows:

- Expansion and improvement of speech and hearing services for the handicapped.
- Expansion and improvement of the program for the seriously mentally handicapped.

- Expansion and improvement of the education of elementary children with learning and behavioral disorders and mild mental retardation.
- Expansion and improvement of essential early education for handicapped children under legal school age.
- Increased effectiveness of special and regular educational personnel in teaching handicapped children.
- Improved technical assistance capacity of special education services by the addition of two staff members to the state department of education.

Based on Garvin's report, the board voted to lend their support to S. 98 and to request that the first year's full costs be allotted from the governor's $2.5 million discretionary fund. (This special fund was established by Governor Deane C. Davis to support innovative state programs.) One provision was added to the board's approval, however: S. 98 should be put into effect over a 10 year period.

GRASS ROOTS ORGANIZATION

Identifying themselves with names such as Caledonian Coalition on Legislation for Handicapped Children, Washington County Citizens for S. 98, and Bennington County Supporters of S. 98, county groups were operating by the beginning of the new year, not without some lessons learned however. Grad (1975) recalled:

> The plan was to organize supporters of the bill on a county basis (there are 14 counties in Vermont), and to hold four regional training sessions in December and four followup sessions in January in an effort to maintain the level of interest and knowledge of volunteers. We hoped to raise the operant level of volunteers high enough so that they could sell the bill to their legislators and communities. The training sessions were productive, but it soon became apparent that the intricacies of the bill would not be understood by most of the volunteers.
>
> County groups were comprised primarily of parents and special educators. Each group was asked to find a county chairperson who would be responsible for keeping in touch with the steering committee chairperson (Sister Janice Ryan), and providing her with up to date information on the activities of the group. After the first training session we found that our expectations were not in line with volunteers' abilities within the time framework. Our first approach was to provide the people who attended the meetings with voluminous file folders crammed with information on how to form a county group, how to form a speakers' bureau, how to function, how to give a speech, and so forth. All we managed to produce was mass confusion.
>
> During the following three sessions, we approached the problem from the standpoint of objectives to be achieved. Each group was told its objective was passage of the bill through persuading local legislators that the bill was absolutely essential to special education in their community. The groups were told that S. 98 not only must be passed during this legislative session, but that it must also be fully funded for the coming year. It was clear that we had much to learn about effectively reaching people who were vitally interested in this legislation, much less those who had to be persuaded. Thus, we established personal contact with local people during the months of December and January and helped each county group to begin functioning.

The winter of 1971–1972 had the third heaviest snowfall in nearly 40 years in many parts of the state. Travel to these regional leadership training sessions was, at times, treacherous. Five people would usually make these nighttime trips: Sister Janice Ryan, Dr. McKenzie, Mrs. Perelman, Mrs. Grad, and Miss Garvin. The well publicized gatherings would be organized by the county chairperson and normally drew over 35 people. The program would generally last two hours and would include a review by Ryan of the organization's goals and the part county groups played in achieving those goals. Garvin would then field questions about the bill and its implications.

County chairpersons reported on organizing progress, area legislators for and against, and future tactics. Lists of legislators and educators, reports on activities in other counties, notations on frequently asked questions, and estimations on upcoming legislative committee problems would be shared. Often, sympathetic local senators or representatives would be invited to appear as part of the program. Local groups conducted tours of special education facilities for legislators, potential public opinion leaders in the area, and interested citizens. One member of the VCH steering committee would generally attend and speak on the need for S. 98 and the design for its implementation.

Press coverage of such events would always be arranged and used as a way of attracting legislators and others interested in the issue. An informal newsletter began circulating in January 1972, and separate monthly meetings were set for county chairpersons in order to maintain high interest and motivation.

GOVERNOR DAVIS: THE LOYAL OPPOSITION

Deane C. Davis was the 77th chief executive of Vermont. A Republican and a former president of one of the state's largest insurance companies, he interrupted his business career several times to hold various posts in state government, including a superior court judgeship. Elected governor in 1968, Davis took office on January 9, 1969.

Governor Davis (1972) mounted his own campaign against new expenditure programs with his state of the state address before the Joint Assembly on January 5. In a speech concluding, "We have asked too much of government and not enough of ourselves," the governor, while not specifically mentioning S. 98, maintained that the increased costs for education placed two questions before state government:

> Can it be clearly demonstrated that these massive increases in educational expenditure are reflected in a commensurate increase in the quality of education possessed by the graduates of our schools? At what point do the costs incurred in the pursuit of a desirable . . . even imperative . . .goal . . .the education of our young . . . become so heavy that the pursuit becomes damaging to the public interest?

SENATE COMMITTEE ACTION

The new legislative session opened in early January 1972. Under standard procedures for a bicameral legislature, all bills calling for the appropriation of revenues are initiated in the house. The governor's recommended budget for the coming fiscal year serves as the blueprint for the legislative committee charged with determining the state's expenditure areas.

In Vermont, as in most state legislatures, the House Appropriations Committee annually develops, over a period of three or four months of concentrated effort, an Omnibus Appropriations Bill which authorizes all of the expenditures in state government. The process begins early in each session. Thus, while S. 98 was being deliberated in the Senate, the actual monies to implement its provisions were being determined in the House and, more specifically at that point, in the House Appropriations Committee.

The VCH was told that the Senate Education Committee had planned to take up S. 98 as its first order of business but was awaiting the governor's suggestions concerning the issues of mandation, the appeal process, and funding. It was made clear at the meeting that the committee would not move until the governor's comments on the bill had been received. Warning was also offered by Senator Boardman that the bill could well be amended in the Senate committee, and that S. 98 should be brought to the Senate floor for a vote as soon as possible because the sponsors could not defend the bill before then (Vermont Senate Education Committee, 1972a).

The amending of S. 98 began the following day. Governor Davis was reported to have recommended to Senate Education Committee Chairperson Purdy that changes be made in the section which placed the responsibility for providing educational services to handicapped students with the local districts. The second day of committee deliberations concluded with Senator Purdy's announcement that the bill faced major changes.

Governor Davis took his position on the bill to a wider audience than the state legislature on January 16 when he appeared on a television issue program. Declaring that "almost nobody is happy with the system today," he said that S. 98 was too general and too vague. He maintained that he objected to "mandatory language" being attached to an "undefined type of education." He also held that towns were doing all they could and that the bill "would open a whole Pandora's box of litigation" against them ("Governor dislikes bill," 1972).

The committee gave Senator Newell of Caledonia major responsibility for the redrafting of S. 98. When the senior legislator's amended version was presented to the committee on the 25th of January, it was without mandation, without local responsibility for implementation, without the 1983 goal, without mention of the $400,000 deemed necessary to initiate the first year's programs, and without provisions for administrative or judicial remedies. Those portions of the original S. 98 remaining were the early essential education section, support for training programs, and the formula for 75% reimbursement to localities for salaries of special education personnel.

Garvin was invited to testify on the Newell draft the following day. At the end of a two hour session, Garvin had persuaded the committee to replace some of the original S. 98 provisions. At her request, a copy of the Newell draft and an invitation to testify were extended to Sister Janice Ryan and the VCH steering committee (Vermont Senate Education Committee, 1972b). Ryan, Sylvester, and McKenzie met with Garvin the following morning to go over the Newell rewrite and hear her views on what changes would be made as a result of her conference with the committee. It was decided that VCH should not assume that changes promised to Garvin were, in fact, reality and should approach the senate committee firmly committed to the provisions of the original bill.

Ryan opened the hearing with a one paragraph statement:

> Senator Purdy and members of the Senate Education Committee: The Vermont Committee for the Handicapped has undertaken consideration of Governor Davis' two primary objections to S. 98: the definitions of handicapped children and special education which he felt would create hardship and expense to towns and . . . "open a whole Pandora's box of litigation . . . ."
>
> While we do not agree with the governor's position, we are willing to accept the definitions of handicapped children and special education which are presently incorporated in Title 16, Section 2942, of the Vermont Statutes Annotated and which are supported by both the governor and the Senate Education Committee. It should be clearly understood that these definitions have been law since 1953 and have not led to hardship, expense, or a whole Pandora's box of litigation. With these primary objections removed, we feel confident that the original S. 98 will receive the support of the governor and the legislature and will be enacted into law in the shortest time possible. Thank you. (Vermont Senate Education Committee, 1972c)

Committee members were confused and angered by Ryan's brief statement. Expecting a more compromising position, these initial feelings were followed by often untempered questioning and discussion. The committee reiterated its concessions to Garvin: rights of parents and children to appeal to the state board of education; strengthening of the state board's responsibility to monitor and promote special education services; and the addition of a first year funding figure of $288,000. Mandation was still not agreed to, but a clarifying statement, written by Senator Purdy, was proposed which obliged the commissioner to provide for special education and early essential education "subject to the availability of sufficient funds and trained personnel." McKenzie responded for the VCH:

> Our position is that all of our children should have a basic education. I believe that with the money currently allocated to the state department of education we can achieve this; all children will learn basic arithmetic, reading, writing, spelling, and speaking skills. We would have to take away some of the things that are not basic education, Senator Purdy. We would have to give up, perhaps, some aeronautics courses that are taught in high school. Perhaps we would have to give up French 5. We would have to think hard to organize our priorities but, I believe, the position of the Vermont Committee for the Handicapped is that all children should have at least a basic education and, if we do that first, then, with our extra funds we will provide French 5. (Vermont Senate Education Committee, 1972c)

Purdy replied, "Well, you are not giving equality of education to the average, normal child, are you?" To which McKenzie answered, "Yes, they will learn to read and write, too, sir."

On February 8, 1972, the Senate Education Committee completed its deliberations on the bill and approved the watered down version of S. 98. Senator Newell was designated as reporter for the committee. As such, he informed the Senate of the committee's action, and the bill was committed to the Senate Appropriations Committee for its scrutiny and opinion.

HOUSE APPROPRIATIONS AND FINAL SENATE ACTION

The work of those charged with keeping the communication network operating between VCH headquarters in Burlington and the rest of the state during these weeks was intense. Grad instituted a weekly phone call system at the beginning of February to keep county chairpersons updated on the latest activities in Montpelier. Memoranda, newsletters, press releases, and the development of materials, fact sheets and analyses for the county organizations were also employed.

Concentrated effort by the VCH steering committee and the county groups centered on the Appropriations Committees. An uphill battle seemed to be promised by House Appropriations Committee Chairperson Marshall Witten who was reported as saying that he was not enthused about committing the state to such a long term program without monitoring it for one year ("Thin special education measure," 1972). Witten's remarks caused a wave of angry reaction from S. 98 supporters. As the headlines read "Handicapped Aid Bill Dead" (1972) and "Special Education Prospects Dim" (1972) the VCH tried to reassure backers that the bill was not dead.

HOUSE ACTIONS: UNEXPECTED BREAK AND LAST HURDLES

In its continuing examination of Governor Davis' proposed fiscal year 1973 budget, the House

Appropriations Committee uncovered a disguised "slush fund" of more than $400,000 in the Human Services Agency. Under questioning by the committee, the budget and management commissioner divulged that Governor Davis had hidden revenues for 90 new positions within state government under a section entitled "contractual services."

Witten criticized the governor's actions and was supported by members of his committee. "What else can we do?" he asked. "Very simple, take the $400,000 and use it for the handicapped children's bill," replied Representative Douglas Tudhope, a Republican from South Burlington (Doyle, 1972a). Tudhope had been working with Ryan and the VCH steering committee since the first part of the year. A teacher, the freshman legislator from South Burlington served as clerk to the Appropriations Committee and was one of its most forceful advocates for S. 98. The following week the House Appropriations Committee approved the additional $288,000 estimated to be necessary for the first phase of the new special education initiatives.

With the appropriation assured in the House bill, proponents of S. 98 continued their efforts to have the Senate Appropriations Committee reinsert aspects of the bill which were not included in the Senate Education Committee's rewrite. Of particular concern was the mandation.

Senators Alden and Crowley appeared before the Senate money group to plead for the mandatory clause. "If the federal government can mandate clean water by 1980, we ought to be able to mandate special education by 1983," Senator Alden maintained. Despite their appeals, the Senate committee decided to approve S. 98 as submitted by the Education Committee. The day after the Omnibus Appropriations Bill, including the $400,000 for S. 98, was passed by the House and sent to the Senate, S. 98 came up for a vote on the Senate floor.

County chairpersons and VCH members were notified of the pending vote. They were requested to make further contact with senators to ensure their support of the bill and of floor amendments to mandate the educational rights of the handicapped by 1983 and to keep the $288,000 appropriation in the bill. Despite attempts by sponsoring senators to amend the bill on the floor, a full day of deliberation resulted in a voice vote passage. S. 98 was ordered sent to the House forthwith.

Recalling the shift of focus from the Senate to the House, Grad (1975) stated:

> The committee felt threatened when S. 98 moved from the familiar 30 member Senate into the strange 150 member House. Attempts were made to cover as many of the House Education and House Appropriations Committee meetings as possible. The League of Women Voters observer corps was particularly helpful in this phase. They reported to us nearly every day on the results of committee meetings and, since they supported the bill under their Human Resources Consensus, they did a great deal of expert lobbying for us. It was the responsibility of the steering committee to keep the league observer up to date on the rationale for any stand of the Vermont Committee for the Handicapped.
>
> Steering committee members were called upon several times to testify before House committees on the details and ultimate implementation plan for S. 98. It was particularly interesting to note that Jean Garvin was not perceived by legislators as a member of the Vermont Committee for the Handicapped and was consistently called on for her expert knowledge in the field. We found a friend in the clerk of the House Appropriations Committee, Doug Tudhope, who time and again offered his knowledge of the legislative process and reassurance that the bill would not encounter any insurmountable difficulties.

By the time S. 98 reached the House and was referred to the House Education Committee, more than a dozen statewide organizations had endorsed the bill. Among these were all of the state associations for the handicapped, the League of Women Voters, the Vermont Diocesan Pastoral Council, the Vermont Superintendents' Association, the Vermont Jaycee Model Legislature, the Vermont Women's Political Caucus, the University of Vermont College of Education, the Vermont chapter of the National Association of Social Workers, the Governor's Committee on Children and Youth, and the Governor's Committee on the Status of Women. (Vermont Committee for the Handicapped, undated). In addition, many of the county groups had lists of local organizations and chapters which had endorsed the bill.

The Vermont chapter of the American Civil Liberties Union (VACLU) announced its backing of S. 98 in January. The resolution, passed after a presentation to the board of directors by Sylvester, read: "The Board of VACLU supports the principle that the state of Vermont must supply an equal educational opportunity to all children, including the handicapped." As S. 98 was sent to the House, the VACLU board put weight behind its resolution with a letter to Representative Henry Carse, chairperson of the

House Education Committee. The final paragraph of the letter stated that if the legislature did not guarantee the rights of handicapped children to an equal educational opportunity, the VACLU would consider filing suit to force the state to act.

Several hearings and meetings preceded House committee action. Termed "a powerful bargaining tool to spring loose other bills" by Chairperson Carse ("Carse says," 1972), S. 98 cleared the Education Committee a week before the legislative session was scheduled to close. The bill was sent on to Witten's House Appropriations Committee.

Little word was heard of that committee's considerations on the bill. Tudhope had told the VCH group that it should not become overly involved in the process at this point as internal trading was going on (Vermont Committee for the Handicapped, 1972). The *Burlington Free Press* reported late in the week that the House Democrats, who numbered approximately one-third of the House membership, had voted to request prompt approval by the Appropriations Committee. The Burlington paper also reported on word of dealing between the House and Senate:

> Despite the Democrats' avowed distaste for bargaining with the special education bill, informed sources in the House, including the chairman of the Appropriations Committee, R. Marshall Witten, R-Bennington, have said this may be the precise use to which the bill will be put. Witten has suggested that a tradeoff between the appropriations bill and the education bill would be a natural development since both are major bills. While Witten is not enamored of the education bill now in his committee, he may be willing to make concessions to get his money bill through the Senate without major revisions. (Ward, 1972)

On March 29th, a few days before the Easter weekend and the close of the legislative session, Mavis Doyle (1972b) of the Vermont Press Bureau reported that S. 98 was being held in the Appropriations Committee

> to force the Senate to pass a measure governing campaign expenses some lawmakers have strong reservations about. The ransom plan was said Tuesday night to have been engineered by the administration of Governor Deane C. Davis, who wants the campaign expense legislation passed before the legislature adjourns this week. The campaign spending bill has already passed the House, but it was completely rewritten, and there has been considerable grumbling that it's aimed at helping Governor Davis' top choice for the Republican gubernatorial nomination this year.
>
> Davis is said to favor Luther F. Hackett of South Burlington for the nomination, if the governor doesn't run again himself. Hackett, according to several state polls, is virtually unknown among the statewide electorate. The campaign spending bill, most believe, would make it easier for him to become known by extensive use of advertising. Thus Governor Davis is reportedly determined to get the bill passed and, with assistance from the House Appropriations Committee, is using the special education bill to guarantee it. Representative Marshall Witten . . . has acknowledged that he will be an active campaigner for Hackett.

The deadlock between the two bodies was reported to have been broken on the day of the Doyle article. Legislators were said to be talking of adjournment late the following day or, at the latest, the day after, Good Friday. While S. 98 was said to have been passed by Witten's committee, it had not been submitted to the Senate clerk as of late Wednesday.

> If the Appropriations Committee does not bring the bill into the clerk's office until Thursday, it won't appear on the calendar until Friday, and even then, it will take a rules suspension to get it up for action. ("Witten's committee," 1972).

Should the House act favorably on S. 98, two additional roadblocks could potentially stop it from becoming law: (a) Any substantive amendments to the Senate passed version made in House committees or on the House floor would force a Committee of Conference to iron out the differences, and (b) Governor Davis held veto power over whatever was passed by the Assembly.

S. 98 was placed on the House calendar for consideration on Holy Thursday. Members of the VCH sat in the gallery from early morning on waiting for their measure to be taken up for debate. Not until 5:30 p.m. was S. 98 finally called by the House leadership. Representative Carse reported the bill and Representative Tudhope made supporting remarks. A third representative asked for a dinner recess and the House was recessed for two hours.

The House reconvened at exactly 7:30 p.m., before many legislators and S. 98 supporters returned from dinner. Without discussion, it was passed immediately on a voice vote. About 30 minutes later, Mr. Brooks, assistant secretary of the Senate, presented a message to the House from the Senate. Among those bills he reported the Senate had acted upon was H. 502, the campaign spending bill (Journal of the House of the State of Vermont, 1972).

The House amended bill reached the Senate on Good Friday morning. The rules of the Senate were suspended, and the Senate quickly voted to accept the House amendments and ordered the bill delivered to Governor Davis for his signature. Despite his original opposition, the governor signed the bill that afternoon before hastily gathered members of the Vermont Committee for the Handicapped, sponsoring senators, and education department officials.

EPILOGUE

Congratulations were generously spread throughout the state, to and from the VCH. The VCH steering committee began to concern itself with its future role. The members realized that a law was merely words and that only proper implementation could bring about the better educational realities they had hoped S. 98 would provide.

Garvin, who had taken an Easter vacation feeling confident that the legislature would not act on S. 98 until the following week, returned to find the new law demanding stepped up planning for actual implementation. Within a week she convened 21 representatives from public and private organizations and from institutions of learning to discuss and determine ways of identifying the estimated 10,000 handicapped children in Vermont not being served ("Identification," 1972).

At its June meeting, the state board adopted a formal resolution committing the state to providing a public educational program for every handicapped child by 1983. The board's mandation resolution was passed after a presentation by Garvin which outlined her plans for expending the additional monies provided for fiscal year 1973 and objectives for future programs ("Education board approves," 1972).

The Vermont Committee for the Handicapped incorporated in June 1972. Since that time, its activity level has seesawed with the swearing in and the adjourning of the legislature and the annual requirement to lobby for funds to implement the next step of the ten year plan. The county groups, too, only become truly operational when the steering committee reminds them of a pending appropriations fight. Then the letters once again flow and citizens from all over the state join the VCH in Montpelier, collaring legislators in the halls of the State House. Though the budget battles have been no easier than that of the winter and spring of 1972, each year the legislature has been sufficiently convinced to appropriate the needed amounts.

New members are invited to join the steering committee, but few have either the time, the travel ability, or the energy to remain long. Ryan, Garvin, McKenzie, and Perelman remain as leaders of the committee. Dissatisfaction with the annual "hat in hand" ritual has recently led to discussions of a court suit among some members of the steering committee, an approach rejected in the beginning days of the S. 98 venture in order to "see how it would work" (Perelman, 1974).

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MARTIN L. LA VOR

Martin Hatches an Egg: A Fairy Tale Describing the Way Laws Are Made

(With appropriate apologies to Dr. Seuss)

☐ Suppose that Congress, not the chicken, hatched the first egg. What would it look like—what would its size, shape, and color be? What would it contain, and how large would it be? What would you do with it? These are just a few of the questions that would have to be answered before the egg could be made into a law. Laws, like new ideas (and eggs), are not created overnight. They must be developed and nurtured; over a long period of time they are sat upon, spat upon, raved about and complained about, proposed, modified, accepted, rejected, or discarded.

New laws are often initiated by the President, and they can and do originate in the Congress as well. The original thought can emerge from anywhere, inside or out of the government. To start this fairy tale, let's assume that the idea of the egg was conceived by J. Malcolm Martin, a well known Vermont lawyer, philanthropist, golfer, and raconteur. Imagine that Mr. Martin discussed his concept at a local Rotary meeting which by chance was attended by several visiting politicians. One of them happened to have a friend at the White House whom he told about Martin's idea. The White House aide passed the information on to the President who liked it and gave his approval for its development.

In order to develop the specifications for something as new and revolutionary as the egg, assume that the greatest minds in the country were assembled to serve on a Presidential Task Force on the—the—the—hey, wait a minute! Before we go any further, consider that we have been referring to Mr. Martin's idea as the egg and we do not even know yet what it is or what it will do. Besides, how do we know what the task force will call it? What would you call a federal agency with an acronym like EGG anyway?

Because the egg did not exist and was only a figment of one man's imagination, the President was advised by the secretary of state that, because the concept was not thoroughly formulated, "it would be best to keep all discussions top secret and only include those individuals who could be trusted." The President then directed that he wanted only the "most qualified and competent persons to serve." His advisors argued that task force members should not be chosen simply because they were capable; they contended that the President's primary concern should be to find individuals who could be trusted. With a project of this magnitude, they said, "we can't take the chance of anyone (particularly the Congress or the press) finding out about it and doing something before we do. After all, this is our idea. In an election year it is important to get as much mileage as possible out of a far reaching concept like this. We could sell it by saying that it will be the most sweeping piece of social legislation in two generations. Who knows? With an idea like this, we might be able to change the entire course of the nation or even the world. Yes, the world, Mr. President." The President thought to himself, "My idea (sigh) changing the course of history. I had better get that task force (very top secret) into action—history awaits me!"

In order to move this fairy tale along, pretend that the great minds assembled, were able to develop the proposal, work out all details, and even unanimously agree on it. (This assumption, of course, guarantees that this story is pure fiction.)

The President's Task Force recommended:

1. That the President establish a permanent task force to continue study of the subject.
2. That the President propose to the Congress legislation to allow the federal government to develop the egg.
3. That the Administration's description of the egg should be:

   > The egg shall be an oval or round body produced by a female and shall contain the germ of a new individual along with food for its development. It should be enclosed in a shell or membrane. It may be cooked and eaten.

Once again, for the sake of good fairy talemanship, we must accept the premise that not only was the task force able to agree on all of the recommendations, but also that the President accepted them without change and ordered a legislative proposal to be developed and sent to the Congress. Now the reader must understand that just because the President wants something does not mean he is going to get it. He must first cross many bridges, consult with the many experts, politicians, and others who are responsible for "running the government." The first problem to be solved, however, was which federal department should have primary responsibility for "Project Egg," and which agency or agencies in that department would have jurisdiction over it?

JURISDICTION

To make this determination, the following logic might have been applied. Because the egg, as defined by the task force, would be edible, it was food; therefore, some felt it should be given to the Department of Agriculture. On the other hand, if the egg was food, and food is necessary for good health, and the egg would make Americans healthier, then it followed that jurisdiction should be given to the Department of Health, Education and Welfare—possibly to the National Institute of Health—for development. To further strengthen HEW's claim, it was argued that a good nutrition program is essential for a sound educational experience; therefore, the Office of Education should also have a role. It was also rationalized that, if the egg would aid health and education, then it could also be used for poor people in welfare programs so the Social and Rehabilitation Service could have a role too.

Other federal agencies were not standing idly by, and they too began developing their reasons as to why they should have control over the egg. The Commerce Department claimed that the egg would stimulate new domestic industries and business in general, and that the potential for foreign trade was unlimited. The Labor Department declared that because unemployment was over 9%, it should develop a program which, it was contended, would employ at least 4% of the total work force in "egg-related jobs," thereby eliminating the need for federal manpower programs. The Community Services Administration (formerly the Office of Economic Opportunity), because it had not received a new program in five years, pleaded for any role and offered to handle egg research and development programs.

But with all the possible uses for the egg being discussed, the issue of jurisdiction took on a new dimension. Because no activity in Washington is really secret, and since several foreign powers were beginning to indicate interest in the egg, "for the good of the country" the CIA and Defense Department attempted to take over immediate control of the entire project. The President was forced to call his cabinet and advisors together for a top secret session. After all arguments were made, and political and personal pressures felt, in particular from the newly created National Committee for Full Development of the Egg, the President assigned development of the project proposal to the Department of Health, Education, and Welfare.

Having won control over the project, the secretary of HEW found himself confronted with a problem. While HEW was attempting to get jurisdiction, all of its agencies had worked together toward that common goal. But, once it was assigned to HEW, each agency wanted personal control over it. Endless meetings were held, internal friction developed, and the secretary finally decided that because the project was so important he would retain jurisdiction in his office and set up a special departmental task force to develop the legislative proposal and get it through the Congress.

It would appear that the secretary made a wise decision; however, jurisdiction in an agency does not necessarily relate to jurisdiction of the various committees in the House or the Senate. Consequently, another major decision had to be made—how to submit the package to the Congress. No idea, however, becomes the law of the land unless it is first approved by both houses of Congress and signed by the President. But before an idea can even be voted on by either body, and even though the President and his departments feel that they have already thoroughly studied the idea, it must first be assigned to a committee in each chamber, restudied, reresearched, reconsidered, and acted upon by those committees. Committees are independent and guard their jurisdictions closely. Depending upon which party is in power, they may work closely with the Administration; however, when the President is from one political party and the Congress is controlled by the other, it is often a different matter.

Taking note of committee considerations, political considerations, White House considerations, and agency considerations, the secretary of HEW, along with his task force, began to make judgments and decisions. The first consideration was whether the egg proposal should be sent to the "Hill" as a single package or should be split into several parts. A total package would be left solely to the workings and will of the Congress; whereas, some suggested, several bills, with involvement by more than one committee, might give a minority President a better chance of getting at least parts of a controversial proposal through. Endless task force meetings were held and arguments, maneuvers, and compromises carried out. The Office of Management and Budget, even with a $69 billion budget deficit in an election year, was able (miraculously) to find $1 billion in new funds to earmark for the President's proposal. Finally, after eight months of effort, the final decision was made and the "Developmental Egg Administration Development Plan" was forwarded to the Congress as an omnibus proposal.

EGG IN THE HOUSE

As the agencies of the federal government have specific jurisdictional areas, so does the Congress. These jurisdictions are vested in committees, their subcommittees, and their respective chairpersons. Their control is, with few exceptions, complete. The assignment of subject area responsibilities is generally not particularly logical by subject, and there are great variations from the House to the Senate. For example, school lunch legislation is handled by the Agriculture Committee in the Senate, but by the Education and Labor Committee in the House. Health legislation is handled by the Interstate and Foreign Commerce and the Ways and Means Committees in the House, and by the Labor and Public Welfare and Finance Committees in the Senate. Although a bill can be referred to more than one committee, committees are generally careful not to cross jurisdictional lines; however, they sometimes authorize a service which is also the specific responsibility of another committee.

Since there had never been anything like the egg proposed to Congress, there was no precedent for committee jurisdiction over the legislation. The Speaker of the House therefore established a special committee to handle the Administration's "Developmental Egg Administration Development Plan." Within a short time the proposal became known as the DEAD Plan. Because of the magnitude of the plan, the new chairperson decided that the full committee would sit as a subcommittee and consider it.

The chairperson, however, was fully aware of the political impact of the plan and decided to share the wealth and the responsibility with the majority members of the committee. He therefore established 12 ad hoc subcommittees to serve as adjuncts to the full committee to assist in studying the DEAD Egg proposal.

The subcommittees were:

- The Special Subcommittee on Name
- The Special Subcommittee on Color
- The Special Subcommittee on Size
- The Special Subcommittee on Shape
- The Special Subcommittee on Development
- The Special Subcommittee on Preparation
- The Special Subcommittee on Food Value
- The Special Subcommittee on Other than Food Value
- The Special Subcommittee on Labor Impact
- The Special Subcommittee on Migrant Impact
- The Special Subcommittee on Women
- The Special Subcommittee on the Poor

Each subcommittee held hearings and many questions were raised; interest groups became vocal. First the environmentalists protested because the egg was to be a living thing and they felt the government had no business tampering with it. The chickens protested, and the question of which came first was thoroughly explored. The Easter Bunny and Santa Claus protested, contending that nothing was sacred anymore. Farmers protested because they wanted a piece of the action and did not think HEW should have responsibility for something which appropriately fell under the Department of Agriculture. Feminists protested and declared that both men and women should be responsible for the egg's production.

On the matter of color, varying racial interests responded strongly, calling for the egg to be either white, black, brown, red, or yellow. A veterans' group argued that a truly American product could only be red, white, and blue. Those interested in foreign affairs contended that because the egg had the potential for peaceful use and could solve the hunger problems of the world, more internationally acceptable colors should be used.

BREAKTHROUGHS

The first major breakthrough came over the name. Since nobody in either party on the committee particularly liked the name egg and since it was an Administration proposal anyway, the committee felt compelled to exercise its prerogative and decided to change the name. Suggestions came in from all over the country. At one point over 15,000 names were being considered. Finally the committee narrowed the list down to six names:

1. Egg (proposed by the hardline Administration backers)
2. Thing
3. It
4. Pineapple
5. Love Bug
6. Judy

The committee members argued, debated, caucused, pondered, and filibustered, but they remained deadlocked. The chairperson of the full committee, in an attempt to bring about a compromise, finally intervened. The members, having a high regard for their chairperson, decided to honor his 57 years of service in the House and unanimously voted for a name: *Melvin Snerd.* Thus the Administration lost its first battle as the egg became known as the *Melvin Snerd* or a "Mel."

Looking ahead to the Senate's consideration, the House, determined to avoid one confrontation, decided to honor the chairperson of the Senate committee as well. His name was Sam Ferd. Thus the name Sam emerged. A final compromise was reached between Mel and Sam and the egg officially became known as *smel.*

Another agreement was reached on shape. Round, oval, square, triangle, rectangle, and every other geometric shape were discussed and considered. The American Institute of Architects as well as all of the designers' groups in the country came forward with designs to package the *smel.* The Administration fought hard, insisting on its round or oval shape. Since such a shape could not stand on its own, a compromise was reached. The basic *smel* would be oval, but each oval would be encased in a square to facilitate packaging and shipping.

While the committee was able to reach agreement on name and shape, it experienced incredible difficulties in reaching any agreements on use. The original Administration proposal called for an egg that could be cooked and eaten, but the question was raised by the committee as to which method should be used to prepare a *smel.* Should it be scrambled, boiled, fried, poached, or shirred? Should it be boiled in its square container, or should it be removed from the square and cooked as an oval?

SIDE ISSUES

As these questions were being asked, a side issue arose; how would the material or the inner substance be inserted into the *smel's* container? Also, what would the material be? The Administration supporters argued that it should be a fluid substance which was transparent and had a yellow center. The substance would be clear in color, but when heated would turn white and change from a jelly-like substance into a more solid white material that could be cut easily with a fork. To most of the members of the committee, the Administration's concept for the egg was so incomprehensible that they dismissed it out of hand.

In addition to the committee's inability to reach agreement on how to prepare the substance (whatever it would be), it was also unable to agree on how it should taste. Several members of the committee liked foods which were very expensive and hard to get; others simply liked "down home" cooking, and still others argued for ethnic or soul tastes. Some members contended that the *smel* should be a substitute for existing foods, while others argued that as long as the federal government was spending all of this money, it should develop a new taste. While all of the debate about taste and preparation was occurring, several new side issues emerged. Vegetarians from all over the country questioned whether the *smel* should be eaten at all, arguing that since it was not going to be grown in the ground it should not be classified as food.

The President's original proposal said, "The egg shall be an oval or round body produced by a female and shall contain the germ of a new individual along with food for its development. It should be enclosed in a shell or membrane. It may be cooked and eaten." This concept created a whole new series of problems because the way the committee was moving, the *smel* was to be a manufactured item. Those who were arguing the Administration's position contended that the President's original concept for the *egg* did not envision it as being manufactured, but as being produced by a bird. At this time the problem was that if the egg did not exist, then it followed that the bird did not exist either. In fact, nobody knew what a bird was, and the question that really stumped the committee was, Which came first, the bird or the *smel?* A new subcommittee was established to explore the possibility of developing a bird that could produce a *smel.*

At this point there was so much confusion that the committee put aside all other business and met ten hours a day, six days a week, in an effort to resolve the use and taste problems. As if there were not enough difficulties, still another new issue was raised by individuals who contended that the *smel* should not be eaten at all but could have vast military potential. This issue was raised by the Subcommittee on Size, which could not agree on how large the *smel* should be because someone suggested that the *smel's* container could be filled with a destructive material and used as a bomb or bullet rather than as food.

The problem originated because the Administration's concept of a shell could not be understood. Most members argued that it did not make sense to build a container that could easily be cracked so that the ingredients would just drop out. They said that since they were going to make a container, it should hold up well. Some thought it should be made of some material which had sufficient size and structure so that it could be used and adopted for warfare. This position prompted a response from the antiwar faction who contended that we have had too much war and the Congress should not be developing any more new tools for warfare.

Other suggestions finally emerged which gained considerable support. As long as the outer casing was going to be square (as agreed earlier), numbers might be placed on the sides. The *smel* could then be held in the hand and tossed on a table for amusement. Others claimed that a round shape would enable a *smel* to be rolled on the ground for still another type of game.

The committee deliberated all of these questions for 18 months, meeting in continuous daily sessions. Finally it reported a bill which accommodated all of the various points of view. The bill allowed total flexibility on the part of the federal government, manufacturers, state and local governments, profit and nonprofit public and private agencies and organizations, and individual users to cook, heat, manipulate, and use the *smel* in any way that fit the need of the particular individuals or organizations using it.

The bill went to the floor of the House where all the issues that had been raised in the committee were raised again. During the course of the debate, 435 amendments were offered and rejected. After three days of heated debate, the House passed the bill by voice vote.

While the House was holding hearings and considering the legislation, the Senate was doing the same. In fact, the Senate (because it considers itself the upper house) held one more day of hearings than the House, but discussed exactly the same issues and raised just as many questions as the other body. Unlike the House, they could not reach any agreement as to what an *egg* or *smel* or any other item which might fall under this topic would be. Because of the lateness of the session and the controversy involved, the Senate felt that the better part of valor would be to sidestep the entire issue and authorize a one year study on the subject. The bill calling for the study passed the Senate unanimously.

ACTION AND REACTION

Because the House and Senate versions of the legislation were different, a conference was called in an effort to resolve the discrepancies. During the conference Representatives and Senators were exposed to every pressure group and lobby in the country, including the Administration, to keep those provisions which they advocated. The conference lasted 19 days and the conferees resolved the differences by retaining all of the provisions from the House bill as well as the one year study called for by the Senate. The study would be conducted for one year to determine whether the development of a *smel* was possible. At the end of one year, whether or not the study was completed and the possibilities determined, all of the House's provisions for full implementation would go into effect.

The final bill was sent to the President, who went on national television from a farm in the Midwest to denounce it and the "irresponsible

Congress." As he vetoed the bill, he said, "Last year I asked the Congress for legislation to deal with a proposal which I considered to be rational beyond question. The Congress took my simple, straightforward, uncomplicated, and very specific proposal and turned it into a bill containing provisions I don't want. In spite of the fact that I was willing to commit $1 billion to my original proposal despite the budget deficit we face this year, I feel that when the Congress authorizes the same amount for 'their *smel*' I must say that it would, in my judgment, exacerbate both budgetary and economic pressures; therefore, I feel compelled to veto this legislation." Just as the President completed his remarks, the first bird to appear on earth flew overhead and punctuated the President's signature as only a bird can.

Section V:

Professional Rights and Responsibilities

Section Editor

Frederick J. Weintraub

Overview

□ Recently a teacher asked what she should do about a dilemma in which she found herself. In her class for severely handicapped children, there was a child who performed far ahead of the other children both educationally and socially. The teacher moved the child on a trial basis to a class containing more mildly handicapped children, where the teacher of the new class concurred the child seemed to belong. Both teachers presented their views to the supervisor who, along with her superiors, rejected any reconsideration of the child's placement. The teacher wanted to know if she could present this information to the child's parents, the school board, or a professional organization. She also wondered if she could refuse the child admittance to her class.

Though the details of the situations differ, her dilemma is one that is shared by most other professionals with varying frequency throughout their careers. What do professionals do when they are required by the system that employs them to do something they believe to be improper for the individuals they serve? What are the professionals' liabilities if they fail to counteract something they feel to be improper? The answers to these questions are far from definitive. But it is apparent that the growing movement of children's rights will force further definition of the rights and responsibilities of professionals who work with children—and particularly exceptional children.

The purpose of this section is to provide the reader with what is currently known about this issue. The authors wish that it were possible to provide professionals with universal guidelines that would stand administrative and legal challenge. Such is not possible at the present time. However, the authors believe that professionals who are knowledgeable on the topics discussed in this section will be in a much better position to resolve the professional dilemmas in which they find themselves.

Weintraub and McCaffrey in their chapter on "Professional Rights and Responsibilities" discuss new and emerging rights and responsibilities of professionals serving exceptional children. They examine the role of the professional as a citizen, employee, and advocate. Although they discuss many relevant court cases, the reader will also find it valuable to read the chapter, "Excerpts from Cases Relevant to Professional Rights and Responsibilities," by Gilhool. These court decisions will provide the reader with a more personal appreciation of the manner in which courts respond to the issues raised in this section.

Turnbull, in "Accountability: An Overview of the Impact of Litigation on Professionals," examines the demands that the rights movement for the exceptional child will place upon professionals. Turnbull emphasizes that this movement will change the accountability of professionals from the system to the child.

Sosnowsky and Coleman, in "Special Education in the Collective Bargaining Process," examine the real and potential impact and the positive and negative influences negotiated master contracts have on the education of exceptional children.

The authors of this section believe that professional associations have an important role to play in helping to define the rights and responsibilities of professionals. While this has been done to some extent (see chapter entitled "AFT and NEA Policy Statements on Teacher Rights and Ethics"), not enough attention has been given to the critical relationship between the professional and the child.

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Professional Rights and Responsibilities

□ The past half decade has produced dramatic changes in the legal and power relationship between exceptional children, their families, and the education system. Concepts such as "right to an education," "due process," "least restrictive environment," and numerous others, while having foundation in the philosophy of special education, never substantially appeared in the lexicon of the profession nor were operationalized prior to 1970. While intensive examination is being given to integrate these changes into the management behavior of education and other systems serving exceptional children, not enough attention is being devoted to the implications of those relationship changes to the professionals who directly serve exceptional children.

The most critical relationship in the education process is between the professional and the child. The professional who serves an exceptional child may be employed by a bureaucracy and yet his or her relationship to the child is the same as all other professionals. In this context, a professional is an individual with a unique expertise for serving the exceptional child. The responsibilities of the professional imply responsibility to the client, in this case the exceptional child. If we accept the premise that the greater an individual's dependence upon those who serve him, the greater will be that individual's potential for abuse from those who serve him, then it is clear that exceptional children are, by definition, inherently highly vulnerable children. The professional who works with the vulnerable child must be an advocate for the child thus reducing the vulnerability. Failing to assume responsibility, the professional can only play the role of participant in whatever injustice may befall the child and assume any corresponding liability. This chapter will set forth the idea that there is no passive role possible for the professional who serves exceptional children.

Professionals in education are not alone in having to adopt new role responsibilities in regard to those they serve. The growing consumer movement has placed numerous other professions in similar, if not more precarious, situations. The medical professional is reeling from an onslaught of malpractice suits and is having insurance policies cancelled or premiums sharply increased. Other examples may be drawn from the relationships between police, social workers, accountants, security brokers or lawyers and their respective clients.

One example appears in the recent Supreme Court decision *Donaldson v. O'Connor*, which found a superintendent of a state residential institution liable for personal damages for failing to provide a patient the treatment required. Another recent Supreme Court decision, *Wood v. Strickland*, held school board members personally liable for actions of the school system which violated the rights of students. Professionals who serve children are finding themselves being sued or dismissed on such charges as malpractice, liability, and assault. The response of many professionals and their organizations has been to turn to insurance. Perhaps insurance is a necessary reality in these times. However, it is the contention of the authors that the professional who understands his or her rights and responsibilities, the rights of those he or she serves, and is able to carry out such in a procedurally fair manner is behaving as an advocate and engaging in good professional practice and is thus free from legal sanction.

It is the purpose of the authors to begin a discussion of the new and emerging rights and responsibilities of professionals serving exceptional children. The discussion will review the role of the professional as a citizen, employee, and advocate. Because of the limited legal and professional substantive knowledge available, more questions will probably be raised in the reader's mind than concrete answers given. For this reason the reader is urged to be cautious in applying the contents of this chapter directly to practicum situations, until more is known. But every movement must have its beginning and its pioneers. Therefore, it is our hope that this chapter will provide aid and comfort to those professionals who are willing to "break trail" for the many others who will follow.

THE PROFESSIONAL AS A CITIZEN

Historically, professionals employed by government, particularly those employed by the education system, have been viewed by the system and by themselves as not having the same citizen rights as nongovernment employees have. Thus, government employed professionals were often hesitant to speak or write freely on public issues, become involved in political activity, associate freely with persons of their own choosing, or practice their personal life in a manner satisfactory to them. Professionals today certainly would not stand for school standards such as "not being permitted to smoke in public," "not being permitted to participate in a political campaign," or "being instructed that their friends are not acceptable to school officials." However, there are other system practices and policies, explicit and implicit, that still restrict the basic rights of citizenship of education professionals.

A major reason for the historical timidity of professionals in education was the assumption that public employment was a privilege and that one only served at the sole discretion of the employer. In *Slochower v. Board of Education*, 350 U.S. 551,555 (1956) a teacher was dismissed because of having invoked the 5th Amendment (privilege against self incrimination) during a hearing before a legislative committee. In reversing the action of the school district, the Supreme Court held that the constitutional right to government employment could be limited only by "reasonable, lawful and nondiscriminatory terms laid down by the proper authorities." In a subsequent case, *Epperson v. Arkansas*, 393 U.S. 97,106 (1968), the Supreme Court stated: "It is much too late to argue that the state may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees."

Freedom of Speech

It has been clearly established that publicly employed professionals have freedom of speech—the right to speak or write publicly on issues of interest to them. However, what if a professional speaks out publicly on matters concerning the schools in a manner that school officials believe is detrimental to interests of the school? Martin Pickering, a teacher, sent a letter to the editor of a local newspaper, just before a bond issue referendum, critical of the manner in which the school board handled fiscal matters. The school board dismissed Pickering, charging that some of his statements were false and that they were harmful to the operation of the school district. The board further contended that Pickering had "a duty of loyalty to support his supervisors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." The Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), reversed the action of the school board. In doing so, the court stated on the matter of loyalty:

> The question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board cannot in a society that leaves such questions to popular vote be taken as conclusive. On such a question free and open debate is vital to informed decision making by the electorate. Teachers are as a class the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. (Van Alstyne, p. 849)

However, the court did not grant a blanket doctrine of free speech. Van Alstyne (1970) points out that "dicta in *Pickering* quite clearly indicate that a teacher may not publicly ventilate whatever thoughts he harbors, however deeply felt his need to do so, with indifference to certain enforceable contraints specifically associated with his position as an employee" (p. 850).

Ocania Chalk, a case worker for York County Pennsylvania, after work went to a meeting of public assistance recipients and urged them to demand their rights from their case workers and to "agitate, agitate, agitate" against case workers who violated their dignity or failed to inform them of their rights of appeal. Mr. Chalk was suspended for violating regulations which require employees to behave in a way which will always bring credit to the commonwealth and never to cause embarrassment to the department. The Supreme Court of Pennsylvania (*In re Chalk* #304 Pa. Sup. Ct., filed January 7, 1971) reversed the suspension, finding that it violated Chalk's freedom of speech and that the defendants had failed to show how their interest in limiting Chalk's right to contribute to public debate was greater than their interest in limiting a similar contribution by any private citizen. As Gilhool (1973) points out, Chalk was reinstated because he had the "right in the discharge of . . . professional duties to respect, to protect, and to act on behalf of the rights of those who are your clients" (pp. 607–608).

Van Alstyne (1970) notes four areas in which there might be justification for restraining free speech.

1. If information is used that was "acquired under specific conditions of confidentiality." Without an assumption that employees and employers within a system can communicate with a degree of frankness—without threat that every communique would become public—it would be difficult for any system to operate.
2. If public redress is sought before seeking redress from grievances through institutionally established channels.
3. If criticism is leveled against closely associated colleagues that results in "intolerable personal relations in the future. Teachers . . . cannot expect that the 1st Amendment will secure their position against a loss of personal confidence which may follow from their public ventilation of every difference of opinion or policy judgment between them and their immediate superiors."
4. If statements are made knowingly false or with disregard for the truth, the competence of the professional might be called into question.

Right to Action

The 1st Amendment not only guarantees freedom of speech but also the right to assembly and petition. Thus the courts have upheld, consistent with the cases noted above, the right of professionals to form, join, lead, and take an active role in organizations and groups regardless of the postures they espouse. As Rubin (1973) notes "mere membership in an organization designated as 'subversive' cannot be grounds for discharge or discipline, nor can a teacher be required to abjure such membership in a loyalty oath."

However, the courts have not been clear on the right of public employees to seek public office or participate visibly in political campaigns. Decisions in this regard have been mixed, often sustaining the right to participate in political campaigns, but not upholding the right to retain jobs and salaries if elected to office. In many instances policies prohibiting political participation have been legislatively repealed and it is expected that as the number of public employees grow and the power of their vote is felt, there will be greater litigative and legislative action in this arena.

Rubin (1973) points out that,

> School authorities in some areas still believe that the private lives of teachers are a proper concern of the school system. The courts, however, are making it increasingly clear that a teacher's private conduct, standing alone, cannot constitutionally be made the business of the state.

The Courts have consistently held that the burden of proof must be on the employer to demonstrate that the professional's behavior or appearance has an effect on the performance of his or her duties.

Substantive Due Process

Professionals in the education of exceptional children have in the past several years become cognizant of the rights of exceptional children and their families to due process guarantees in decisions that substantially affect their lives. The 5th and 14th Amendments which guarantee to exceptional children due process and equal protection provide those same guarantees to professionals in matters concerning their employment and the discharging of their duties.

Basically, substantive due process means that individuals are protected from arbitrary, unreasonable, or capricious decisions that result in loss of liberty or property. In other words, if one is going to be denied liberty or property then it must be for substantiated reasons. Procedural due process is the mechanism by which an individual is assured rights in being confronted with the charges and being able to have a fair hearing to challenge their authenticity and reasonableness. There are two Supreme Court decisions which together provide the framework for understanding the present legal status of procedural due process for public employees: *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). A tenured employee or an employee in a situation where tenure is assumed or a nontenured employee during a contract term who is dismissed is deprived of property rights and entitled to procedural due process protection. A nontenured employee whose contract is not renewed is entitled to procedural due process if he or she had a reasonable understanding that the contract would be renewed. Failure to renew a contract or dismissal from a contract would be a deprivation of liberty if the charges damaged the person's "standing associations in the community," (e.g., charges of incompetence, immorality, and dishonesty). In such instances procedural due process is guaranteed.

Van Alstyne (1970) offers the following six guidelines for employee procedural due process:

1. Terminal action may not be taken other than pursuant to regularly established rules or standards which have been made available to the employee and which are reasonably precise and clear.
2. Proceedings to terminate the employee must be preceded by specific notice of charges providing a statement of facts sufficient to warrant the action contemplated. Adequate time must be provided to enable the employee to prepare for the ensuing hearing, and a list of witnesses plus access to other evidence proposed for introduction at the hearing must be made available to him on request.
3. The hearing must be held before an impartial trier of fact, the outcome of the hearing determined solely on the basis of material placed in evidence in the course of the hearing, and a record must be made of the proceedings.
4. The employee may be represented by counsel present during the proceedings; the employer must provide notice that counsel will be furnished upon request in the event the employee is unable to retain counsel.
5. The employee is entitled to know the evidence offered against him, to confront adverse witnesses, to conduct cross examination either personally or through counsel, to offer evidence and witnesses in his own behalf, and to testify in his own behalf or decline to do so within the privilege against self incrimination.
6. The teacher may appeal an adverse decision by briefs and oral argument, based on the record, with the scope of review, *de novo* on alleged errors of law (that is, an incorrect interpretation of the allegedly infringed rule) and limited on findings of fact to determine whether they are supported by substantial evidence in the record considered as a whole.

Thus, certain constitutional rights are due professionals as citizens. It should be noted, that although the cases cited have supported the teachers in question, the courts have often upheld the system. However, it is the authors' feeling that professionals should become more aware of their constitutional rights, especially the way in which these rights support those of the exceptional child.

PROFESSIONALS AS EMPLOYEES

In addition to those rights specifically set forth in the Constitution, other professional rights evolve from the contractual employer-employee relationship. Although the majority of the cases dealing with the rights of the professional as an employee center around certification, contracts, tort liability, and the security of employment, for the purposes of this paper discussion will be limited to tort liability and security of employment. The cases presented are offered as examples of tort action. However, it is hoped that these cases do not make professionals so cautious that they limit their involvement with exceptional children. Rather, the cases should serve to illustrate other situations where professional rights and responsibilities come into play.

Recent legislation, increasing litigation, and demands for accountability have given rise to new professional concerns. Often, the changes demanded force the educator into a defensive or isolated position rather than permit the emergence of a role which supports the exceptional child's right to an appropriate education. Since the Supreme Court decision *Brown v. The Board of Education* (1954), the attitude of the general public and the courts toward public education has changed dramatically. As Shannon (1973) points out, this change has been brought about by five basic factors (pp. 78-79).

1. The importance of education, which is being increasingly recognized, i.e., it is imperative

that all have equal educational opportunity.

2. Cognizance of the general public over a wider range of subject matter, i.e. broadened civil rights laws which permit persons to seek relief against alleged discriminations or the limiting of the principle of in loco parentis by the courts in the past several years are but two examples.
3. Mounting proclivity to resort to the courts, i.e. people are becoming more litigious.
4. More efficient mass communications media which serve to increase the sophistication of people about the powers of the judiciary and stimulate new imaginative legal theories on which to base court challenges of public school relationship.
5. Inability of legislative bodies to provide adequate solutions to public problems.

Furthermore,

> The fundamental emphasis in filing civil suits against the public schools has switched from seeking relief or redress of an alleged wrong to establishing and creating new law. Hence, a significant number of lawsuits now filed in the United States against the public schools are designed to put the judiciary in the position of creating new legal rights affecting public education, which state and local legislative bodies will have to honor. And with the new design have come new tactics which plaintiffs use in imposing their views on, or enforcing their rights against, public school boards. (Shannon, p. 80)

Examples of the newer forms of litigation may be found in cases which support the patients "right to treatment" (*Donaldson v. O'Connor*), the students "right to proper placement" (*Larry P. v. Riles, 1972*) or "right to education" (*PARC v. Commonwealth of Pennsylvania*, 1971). The creativity of litigation is well noted in the pending case of *Peter Doe v. San Francisco Unified School District* which asks the courts to hold schools responsible for the professional competency of their services. Doe has asked for monetary compensation for damages claiming that his low reading score is the direct result of negligence of school personnel.

Some Implications

What then are the implications for professionals as public school employees? A defensive attitude or claim of insufficient knowledge is no longer permissible as the courts become more explicit as to what school districts must provide. Furthermore, professionals are not immune to direct liability, (*Donaldson v. O'Connor*). As one special education administrator has stated,

> There are several options open . . . the major one involves the administrator's own willingness to assume risk. In all decision making, one must determine the gains to be made by a series of decisions and weigh those gains against economic and political losses that may occur. To be a meaningful administrator means a nonpassive role. (Duncan, p. 1327)

Professionals, therefore, have no choice but to become aware of the issues, know their rights and responsibilities, and operate accordingly. It is imperative, however, that both the positive and negative effects of any action be anticipated.

One of the major, and very real, concerns of professional educators, is that of tort liability. Usually the examples which first come to mind are those involving teacher negligence. However, current litigation serves to illustrate that tort cases are much broader. An understanding of some of the legal terminology should clarify the grounds for tort action.

> A tort is a wrong committed against the person or property of another for which a court will award damages. A tort involves loss or damaged sustained by a person as the result of another person's failure to protect him against unreasonable risk. Torts arise from negligence, *i.e.*, failure to exercise the degree of care for the safety of others that a reasonable and prudent person would have exercised under similar circumstances. Because children ordinarily lack the foresight of adults, one who cares for children is expected to exercise greater care for their safety than would be expected if he were caring for adults. (Peterson, Rossmiller, & Valtz, P. 326)

Furthermore,

> A person who through his own negligence contributes to his own injury is guilty of contributing negligence and under the common law, is barred from recovering damages for his injury. A school age child cannot be charged with contributing negligence unless he is old enough to understand and appreciate the dangers involved in a given activity. (P.R.V., p. 326)

Certain conditions, however, have been established which must be proven before the defendant can be found liable for negligence.

1. The defendant had a duty to protect the complainant against unreasonable risk of injury.
2. The defendant breached the duty, i.e. failed to protect the complainant from injury.

> 3. The breach of duty by the defendant was the proximate cause of the complainant's injury, i.e., that a direct and unbroken chain of events existed between the breach of duty complained of and the injury to the complainant. (P.R.V., p. 290)

In addition,

> A teacher is expected to foresee sources of potential danger to pupils and to take appropriate action to prevent pupils from being injured. Teachers may become liable for damages as a result of their improper or inadequate supervision of pupils who are under their care . . . (and are) also liable for injuries sustained as a result of the teacher's failure to provide adequate instruction or to warn pupils of the dangers in certain activities. (P.R.V. p. 327)
>
> It has been said that in regard to the treatment of injuries the teacher or principal stands in loco parentis to the pupil only in an emergency, and that an emergency exists when there is proof that the decision to secure medical aid cannot safely await the decision of the parent. They are only required to take that action which a reasonable and prudent layman untrained in the practice of medicine would have taken. (P.R.V., p. 321)

However,

> A person who voluntarily exposes himself to known dangers assumes the risk of injury from these dangers and cannot recover damages for injuries caused by them. (P.R.V., p. 326)

This is illustrated by most cases involving high risk sports.

> A high portion of tort cases involving school districts and/or school employees arise from accidents which occur in the course of transporting pupils to and from school. Unless it has been abrogated by statute or judicial ruling, the common-law rule of immunity from tort liability protects school districts from liability for such injuries. For example, the school bus operator, however, will be held liable if the driver's negligence results in injuries. (P.R.V., p. 327)

Alleged libel has also given cause for tort action.

> Teachers and administrators are liable for defamatory material concerning either pupils or other school employees. (P.R.V., p. 327)

Therefore, the fear of personal liability for actions undertaken as a part of one's employment is justifiable as numerous cases have arisen due to the alleged negligence of the school district or its employees. However, the courts have found that educators are not liable for all injuries sustained by pupils but owe them only reasonable care. The amount of care established increases with the immaturity of the child.

Some Cases

Given the preceding, coupled with recent legislation requiring each state to provide an appropriate education for all children in the least restrictive environment possible, consider the following cases:

- The state of New York was held to be negligent and liable for a child's injuries in a case involving a mongoloid child with a mental age of 2 ½ years who was injured in an institution (*Zajaczkowski v. New York State,* 1947). The child was left in the toilet room unattended and was pushed against the metal of a steam radiator. She received a severe burn which became infected and resulted in a scar about five inches by about two to three inches.

  The court's decision to hold the state negligent and liable for the child's injuries was based on the following reasons:

  1. The degree of care to be observed to protect patients from injury, self-inflicted or otherwise, should be measured by the patient's physical and mental ills and deficiencies.
  2. There were not enough attendants, with special training, to care for a large number of mentally deficient and irresponsible children.
  3. The practice of leaving the children unattended for even a short period of time was improper.
  4. There was no contributory negligence on the part of the child for the reason that she did not have sufficient understanding to appreciate her danger. (Whiteside, pp. 59-60).

- *Ferraro v. Board of Education of New York* (1961) represents one of the most extensive cases involving liability for injury.

  > A pupil who had been transferred to a particular school because of a record of misbehavior, assaulted another pupil. The responsible child was known to the principal through prior records. He had stated that she was seriously disturbed, and had asked the Bureau of Child Guidance to examine her concerning her emotional stability. A substitute teacher, who had not been informed of the behavior characteristics of the particular child, was in charge of the room on the day of the accident. The Supreme Court, Appellate Division held that the principal was guilty of negligence in failing to alert the substitute teacher concerning the known misconduct of the student. The court questioned whether it was an

> act of a reasonable and prudent person to merely transfer the child. It was within the superintendent's power to hold a hearing and compel the Bureau of Child Guidance to help him determine if some kind of treatment was needed, and, if necessary, to exclude the child as being dangerous to other children. (Whiteside pp.62-63)

- Another case is *Rodriquez v. San Jose Unified School District*, 1958:

> In San Jose, California a six year old child who had cerebral palsy, congenital heart disease, and seizures that would affect vision and cause tremors to the hands was found unconscious under the horizontal bar during noon recess bleeding from a head injury. He was taken to the hospital and died soon after.

The District Court of Appeal held the school to be not negligent since (a) the mother had asked the teacher not to discuss the boy's condition with others, (b) the school had provided adequate supervision, and (c) the boy himself was aware that he should not be on the bars and he had acknowledged such the morning of the accident. The testimony that the child's mother had told the teacher that she need not tell others of his condition since he knew how to take care of himself would require the jury to consider the contributory negligence of the parents. The court also found that "there was sufficient evidence to justify a finding based on the reasonable inference that the child was negligent in getting on the bars and assumed any risk attendant on doing so" (Whiteside pp. 61-62).

Importance of Awareness

The authors emphasize the importance of being aware of what constitutes tort liability and that consideration be given to what standard of care is due exceptional children. The courts have indicated that the age and maturity level of a child will affect the degree to which a professional is held liable for an injury sustained by a child. For instance, will professional risk increase when working with an exceptional child placed into "mainstream" programs or when placing a severely handicapped child, whose parents contest placement? Rather than avoid such situations, professionals should be aware of the ramifications of their contractual relationships and the degree to which these affect their responsibilities.

That educators must become accountable for their professional behavior is continually being established by the courts. In the right to treatment and the right to education cases, the courts have tried to assure professional accountability on a grander scale, attempting to make professionals in the institutions accountable by making the institutions themselves accountable. Court orders directed at institutions and systems rarely carry personal liability (except sometimes for contempt of court for noncompliance) while orders directed at individuals themselves always do (by personal liability for damages) (Turnbull, 1975). The court's decision in *Donaldson v. O'Connor* serves as an example of personal liability. The plaintiff-appellee, Donaldson, was civilly committed to a Florida State Hospital, diagnosed as a "paranoid schizophrenic." He remained there for 14 ½ years, during which time he received little or no psychiatric treatment. Donaldson filed a damage action against hospital and state mental health officials, contending that he had a constitutional right either to be treated or released. A federal jury returned a verdict of $28,500 in compensatory damages and $10,000 in punitive damages against two of the defendants-appellants, one of whom was the attending physician and the other of whom was the clinical director of the hospital.

Two recent Supreme Court decisions, (*Goss v. Lopez*, 1975) and (*Wood v. Strickland*, 1975) have further specified the extent of professional responsibility. In *Goss v. Lopez* (95 S. Ct. 992) a class action suit was brought by a number of Columbus, Ohio public school students who had been suspended for up to 10 days without a hearing. The Supreme Court held that students facing temporary suspension from school were entitled to protection under the due process clause, that such students should be given notice of the charges, and an opportunity to present his or her version to the authorities preferably prior to removal from school. However, the court foresaw instances whereby prior notice and a hearing were not feasible and the removed student should be given necessary notice of hearing as soon as possible.

In *Wood v. Strickland*, two 16 year old girls were expelled from an Arkansas public high school for spiking the punch at the meeting of an extracurricular organization attended by parents and students. They admitted their involvement, but asserted that they had been denied due process in their expulsion. The court held that, under certain circumstances, school board members can be sued for monetary damages if they violate a student's constitutional right in administering discipline. Cumulatively these decisions hold that some form of procedural protection (a notice and a hearing) must, unless in extraordinary circumstances, precede a suspension irrespective of its length. (Roos, 1975). They further hold that school officials might henceforth be liable for damages under the Civil Rights Act of 1871 if they fail to grant these protections.

These decisions have made many administrators feel that their discretionary powers are being eroded. This, however, is not the case as,

> The majority opinions in both *Goss* and *Wood* exhibit an awareness of that delicate and cautious balancing which must take place as new roles and rights are called for. It is only by overextending these carefully limited decisions or by misreading their possible impact that they can be seen as a threat. (Anson, 1975, p. 17)

As student rights are more specifically defined, the role and responsibility of the educator also becomes more specific. The importance of having a clear understanding of the requirements which result cannot be overstated. Furthermore, the authors feel that by understanding judicial decisions as they relate to exceptional children, the professional will be better able to maintain a supportive, rather than an isolated, role.

Besides personal liability for damages, fear of dismissal provides professional cause for concern. Insubordination, incompetence, neglect of duty, inappropriate conduct, subversive activity, or decreased need for services constitute the majority of the reasons for dismissal. Professionals also are entitled to due process procedures when faced with action for dismissal. These procedures are usually included in state tenure statutes.

> With few exceptions, most tenure statutes require lengthy and detailed procedures before dismissal. Alabama's statutory provisions are typical. Ala. Code tit 52, ss 351-61 (cum Supp 1971). A dismissed teacher must be notified of her dismissal, and is entitled to a statement of the reasons for the dismissal. If the dismissed teacher indicates her desire for a hearing, the school administration is required to conduct one. The hearing may be public or private at the teacher's discretion; the teacher has the right to counsel, to present evidence and witnesses, to cross examine witnesses, and to subpoena witnesses. The hearing is held before the board of education, and a majority of the board must vote to dismiss the teacher for her removal to be effective. Provision is made for appeal to the state tenure commission, which reviews the record made before the board of education. The decision of the state commission is final. (Kirp & Youdof, 1974, p. 251).

Nontenured teachers have, however, successfully challenged dismissal on the grounds that they have been deprived of a statement on the reasons for dismissal and a hearing (*Board of Regent v. Roth 1972*) as discussed earlier.

There are, however, numerous situations in which the professional has either considered or undertaken action which could constitute grounds for dismissal, although in certain situations such action could be considered good professional practice.

Furthermore, it has been established that employees do have the right to refuse to undertake an action they believe to be legally wrong (*Parrish v. Civil Service Commission of the County of Alameda*). Parrish, a social worker, refused to take part in county organized early morning raids on the homes of welfare recipients to determine their welfare eligibility and was dismissed for insubordination. The appellant had previously stated to his supervisors that he doubted the legality of the searches. The county claimed that it could discharge the appellant as he did not know the constitutionality of the searches at the time of his refusal. The court found the searches unconstitutional and thus the social worker possessed adequate grounds for declining to participate.

PROFESSIONALS AS ADVOCATES

It is the contention of the authors that good professional practice is by definition harmonious with the needs of the child involved. Professionals are employed by the education system to serve children, but also to carry out the requirements of the system that employs them. Thus while the child is the professional's client, the professional is at times caught between what he or she believes to be in the best interests of the client and contradicting requirements of the system.

In earlier times and even in some instances today professionals are employed directly by the client and served no other master. The client could decide who to employ, the conditions of the service, and when to terminate. Today, in education the system imposes itself on the child and controls most of the conditions of the relationship. The professional in education finds himself or herself in the middle between the system and the child. He or she is forced into a schizophrenic situation of serving the needs of the child and the needs of the system, which are all to often in contraposition. As Bersoff (1974), discussing this dilemma in regard to school psychologists, noted:

> The major similarity is that the school psychologist is an employee of the institution which hires him/her and to which she/he thus has primary responsibility. Interesting questions arise as a result. What does the school psychologist do when what might benefit the child who has been referred is at variance with the stated goals of the school administration? What happens when a superintendent requests that certain decisions about class placement be tendered about a child because it is in the best interests of the school system that such changes be effected? These, and all other who is the client issues must apparently be resolved, under the present system, in favor of the psychologist's institutional employer.

The cases of *Parrish* and *Chalk* discussed earlier are examples of where professionals exerted their right to behave as professionals and advocate for their clients even where such advocacy was perceived as contradictory to interests of the bureaucracy. The failure of many education professionals to follow this pattern contributed to the massive students' rights movement which armed the students with the arsenal necessary to equalize their relationship with the system. It is not our purpose to discuss the merits of this approach. However, in many ways it has had an impact on exceptional and particularly severely handicapped children. Earlier we discussed the principle that the greater an individual's dependence upon those who serve, the greater will be that individual's vulnerability to abuse. It is hard to conceive of a multiply handicapped child demanding to see his records, challenging his placement, or reporting violation of his liberties. Such children become dependent upon parents or other third parties to represent them. However, these representatives have their own interests to serve and also are not usually present during those situations where abuses arise. Thus the vulnerable child remains vulnerable unless professionals who serve the child assume their responsibility to be an advocate for the child.

Another alternative open to professionals to support their right to advocate for children is that of collective bargaining. Situations do arise whereby work issues interfere with providing an appropriate education to every child. It has come to the authors' attention that, as the states begin to comply with the provisions of placement in the least restrictive alternative, teacher associations are proposing contract provisions which limit the number of special education children in the regular classroom. Some associations are even bargaining to "trade off" a fixed number of regular children for each exceptional child. Negotiations offered by special educators can benefit the exceptional child.

> If, indeed, special education programs are a priority item for future negotiations, it behooves negotiators to make a more careful study of the concerns of the field. Special educators must, on the other hand, become aware of and offer guidance to their regular classroom colleagues at the bargaining table. (Sosnowsky, p. 613)

School systems generally have a set of administrative procedures that employees can use to challenge the appropriateness of requirements of the system. Professionals individually and through their representative organizations should determine whether such procedures are presently operative in their school system, whether they are sufficient for the situations raised in this chapter, and whether they are procedurally fair. Furthermore, all professionals should become well schooled in how to utilize such procedures, and in most instances such procedures should be exhausted before a professional attempts other courses of action.

Some Codes of Ethics

Most professions have codes of ethics or other policies which articulate the normative behavior expected of members of the profession. Such codes are important because they establish standards that courts and other review bodies can use to measure the appropriateness of a particular professional's behavior and the degree to which the system can constrain that individual's behavior. Most of the codes of ethics or statements of rights of education by professional organizations, while persuasive in regard to relationships between the professional and the education system, are substantially limited in articulating the advocacy relationship between the professional and the child. Therefore, the authors suggest for consideration the following principles for discussion by individual professionals and organizations of professionals concerned about exceptional children and perhaps all children. As we did in the beginning of this chapter, we warn the reader to apply these principles cautiously in practicum situations. Although each principle has some foundation in law, the state of the art at this point is such as to not be able to guarantee the security of those who apply these principles in all situations.

1. To report to the system the needs of the child.
2. To demand from the system the appropriate resources to meet the needs of the child.
3. To challenge required participation in any activities that are inappropriate to the needs of the child.
4. To inform children and parents, guardians, and surrogates of their rights and any proposed or practiced violations of those rights.
5. To cooperate fully in administrative or judicial proceedings regarding a child.
6. To refrain from participating in any activities that require skills that you do not possess.
7. To seek appropriate administrative or judicial action against other professionals who violate the rights of children.
8. To participate in political activities that will improve conditions necessary to better meet the needs of the child.
9. To seek through contract negotiation appropriate conditions to better meet the needs of the child and to engage in activities to prevent such contracts from abridging the rights of the child.
10. To express publicly views on matters affecting children.
11. To honor requirements of confidentiality regarding the child and his or her family.
12. To work with other professionals to create an appropriate educational program for all exceptional children in the least restrictive environment.

A willingness to assume risk should be considered as part of the development of the role of the professional as an advocate for exceptional children. However, careful consideration must be given to all factors involved in any action, including the needs of the system. The recent gains made for exceptional children will be hindered if reasonable caution is not taken. Advocacy groups can begin with sound, justifiable theory, only to develop militant attitudes which result in their own isolation. Truly appropriate programs can only be established by the cooperative efforts of the professionals involved.

HYPOTHETICAL CASES

Several hypothetical cases have been included to provide material for further discussion or application of the ideas previously presented.

The first involves Mrs. Jones, a teacher of mentally retarded children. She advises Mr. and Mrs. Ramirez at a parent/teacher conference that they ought to demand a formal due process hearing from the school district before they allow their son to be placed in a class for the mentally retarded. The school principal reprimands Jones for having so advised the Ramirezes, despite the fact that the Ramirezes have agreed to the placement during an informal parents/staff conference. These are the questions:

1. Was she within her rights to have given such advice?
2. Is there a difference if she only advised them on their rights to obtain a hearing or if she had advised them that they ought to demand a hearing because she believed the recommended placement to be inappropriate?
3. Would it have made a difference if Jones was the teacher of the child or just a nondirectly involved employee of the school district?

The second case involves Dr. Philips, a school psychologist, who also works for a private clinic. Many parents seeking reconsideration of placements proposed by the school district, bring their children to the clinic for independent evaluations. Frequently the evaluations done by Philips and his colleagues at the clinic are used in due process hearings to contradict recommendations and evaluations presented by the school system that employs Philips. These are the questions:

1. Is Philips' extra curricular employment at the clinic appropriate?
2. Should he restrain himself from being involved in cases that concern the school district that employs him?

A third case involves Ms. Moyer who takes her class of handicapped children out to the playground. Johnnie falls from the top rung of the jungle gym and suffers a serious brain injury. The questions here are:

1. To what degree is Moyer liable for the injuries suffered by Johnnie?
2. Does the age and demonstrated capability of the child affect the situation? For example, suppose Johnnie was a 9 year old mildy retarded child who had never demonstrated any lack of coordination. Or suppose Johnnie was a 9 year old child who had neurological impairments resulting in substantial motor and perceptual handicaps.
3. Using the above two descriptions of Johnnie,

could Moyer legitimately argue that she was not aware of the child's motor abilities? Would such lack of knowledge be considered reasonable?

4. Suppose the children Moyer taught had emotional disorders and Johnnie was pushed off the jungle gym by Mary who has a history of violent behavior. To what degree would Moyer be liable? Suppose she were standing right by the jungle gym when it happened or that she was at the other end of the playground.

A fourth case may be hypothesized. Several severely mentally retarded children come home from school and in their limited ability to communicate, convey to their parents that their teacher has been hitting them. The parents examine their children and find some minor bruises. The parents bring charges against the teacher. The teacher, Mrs. Dunn, claims innocence. However, she is dismissed by the school district after an investigation by the board into the matter. Dunn brings the case to court claiming that nowhere during the investigation were she and her attorney able to question the only witnesses who were the children and that the parents' testimony was purely hearsay. The school district argues that the children should not be made to testify and be cross examined because of their degree of retardation and that such an experience would seriously damage their educational growth. The questions here are:

1. How do you think a judge would rule on this matter?
2. Can an individual lose his/her job in a situation like this?
3. What are this teacher's rights under the equal protection clause?

A fifth case might involve the Smithfield teachers association which has submitted a contract provision limiting the number of special education students who are mainstreamed into regular classes to two per class. Many of the teachers feel that this arrangement will make it easier to program for the special students. A group of resource teachers feel that this is unfair and try to amend the proposal. They are voted down by the delegate assembly. The questions are:

1. Are the special education children served by the Smithfield teachers being deprived of the best possible educational placement?
2. Is this action legal?
3. What other recourse would the resource teachers have?

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THOMAS K. GILHOOL

Excerpts from Cases Relevant to Professional Rights and Responsibilities

□ The following case excerpts should be helpful to the reader to gain further insight into the matters discussed earlier in this section. (Editors' note: Only the most pertinent footnotes have been included; footnotes have kept their original numbers.)

MARVIN L. PICKERING, Appellant,
v.
BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL
DISTRICT 205, Will County, Illinois
391 US 563, 20 L Ed 2d 811, 88 S Ct 1731
[No. 510]
Argued March 27, 1968. Decided June 3, 1968.

SUMMARY

A few days after a proposal to increase school taxes was defeated by local voters, a public school teacher wrote a letter to the editor of a local newspaper criticizing the way in which the board of education and the superintendent of schools had handled past proposals to raise new revenue for the schools. After the letter was published, the board of education determined that its publication was detrimental to the efficient operation and administration of the schools of the district and that the interests of the school required the teacher's dismissal. The Circuit Court of Will County, Illinois, upheld the dismissal, and the Supreme Court of Illinois, two justices dissenting, affirmed the judgment of the Circuit Court and rejected the teacher's contention that his remarks and comments in the letter were protected by the constitutional right of free speech. (36 Ill 2d 568, 225 NE2d 1.)

On certiorari, the United States Supreme Court reversed. In an opinion by Marshall, J., expressing the views of six members of the court, it was held that in the absence of proof of false statements knowingly or recklessly made by the teacher, his right to speak on issues of public importance could not furnish the basis for his dismissal, and that under the circumstances of the instant case, his dismissal violated his constitutional right to free speech.

Douglas and Black, JJ., concurred in the court's judgment on the grounds that the constitutional guaranty of free speech was even broader than the court acknowledged it to be.

White, J., concurring in part and dissenting in part, agreed that the teacher could not constitutionally be dismissed unless he had knowingly or recklessly made false statements, but would prefer to have the case remanded to the state courts for further proceedings in light of the applicable constitutional standard rather than to have the Supreme Court make the initial determination of knowing or reckless falsehood from the cold record before it.

OPINION OF THE COURT

Mr. Justice Marshall delivered the opinion of the Court.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and hence, under the relevant Illinois statute, Ill Rev Stat, c 122, §

10-22.4 (1963), that "interests of the school require[d] [his dismissal]."

[1] Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overrode appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. 36 Ill 2d 568, 225 NE2d 1 (1967). We noted probable jurisdiction of appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments. 389 US 925, 19 L Ed 2d 276, 88 S Ct 291 (1967). For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

I.

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of $5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor (which we reproduce in an Appendix to this opinion) that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the "motives, honesty, integrity, truthfulness, responsibility and competence" of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment "controversy, conflict and dissension" among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was "detrimental to the best interests of the schools." Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection. In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

II.

[2–4] To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E. g., Wieman v Updegraff, 344 US 183, 97 L Ed 216, 73 S Ct 215 (1952); Shelton v Tucker, 364 US 479, 5 L Ed 2d 231, 81 S Ct 247 (1960); Keyishian v Board of Regents, 385 US 589, 17 L Ed 2d 629, 87 S Ct 675 (1967). "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v Board of Regents, supra, at 605–606, 17 L Ed 2d at 642. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III

The Board contends that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] . . . false or with reckless disregard of whether [they were] . . . false or not," New York Times Co. v Sullivan, 376 US 254, 280, 11 L Ed 2d 686, 706, 84 S Ct 710, 95 ALR2d 1412 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

[5] An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)–(4) of appellant's letter, see Appendix, infra, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.

[6] However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, infra) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

[7] More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.[4]

[8, 9] What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

IV.

[10] The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for

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[4] There is likewise no occasion furnished by this case for consideration of the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public.

defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. New York Times Co. v Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964); St. Amant v Thompson, 390 US 727, 20 L Ed 2d 262, 88 S Ct 1323 (1968). Compare Linn v United Plant Guard Workers, 383 US 53, 15 L Ed 2d 582, 86 S Ct 657 (1966). The same test has been applied to suits for invasion of privacy based on false statements where a "matter of public interest" is involved. Time, Inc. v Hill, 385 US 374, 17 L Ed 2d 456, 87 S Ct 534 (1967). It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in New York Times.

[11] This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Garrison v Louisiana, 379 US 64, 13 L Ed 2d 125, 85 S Ct 209 (1964); Wood v Georgia, 370 US 375, 8 L Ed 2d 569, 82 S Ct 1364 (1962). In Garrison, the New York Times test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.

[9] While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

[12] In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, see Appendix, infra, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

A. *Appellant's letter.*
LETTERS TO THE EDITOR
****Graphic Newspapers, Inc.
Thursday, September 24, 1964,
Page 4

Dear Editor:

I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. First, let me state that I am referring to the February thru November, 1961 issues of your paper, so that it can be checked.

One statement in your paper declared that swimming pools, athletic fields, and auditoriums had been left out of the program. They may have been left out but they got put back in very quickly because Lockport West has both an auditorium and athletic field. In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn't quite regulation distance even though the board spent a few thousand dollars on it. Whose fault is that? Oh, I forget, it wasn't supposed to be there in the first place. It must have fallen out of the sky. Such responsibility has been touched on in other letters but it seems one just can't help noticing it. I am not saying the school shouldn't have these facilities, because I think they should, but promises are promises, or are they?

Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, many letters have been written to this paper and probably more will follow, I feel I must say something about the letters and their writers. Many of these letters did not give the whole story. Letters by your Board and Administration have stated that teachers' salaries total

$1,297,746 for one year. Now that must have been the total payroll, otherwise the teachers would be getting $10,000 a year. I teach at the high school and I know this just isn't the case. However, this shows their "stop at nothing" attitude. To illustrate further, do you know that the superintendent told the teachers, and I quote, "Any teacher that opposes the referendum should be prepared for the consequences." I think this gets at the reason we have problems passing bond issues. Threats take something away; these are insults to voters in a free society. We should try to sell a program on its merits, if it has any.

Remember those letters entitled "District 205 Teachers Speak," I think the voters should know that those letters have been written and agreed to by only five or six teachers, not 98% of the teachers in the high school. In fact, many teachers didn't even know who was writing them. Did you know that those letters had to have the approval of the superintendent before they could be put in the paper? That's the kind of totalitarianism teachers live in at the high school, and your children go to school in.

In last week's paper, the letter written by a few uninformed teachers threatened to close the school cafeteria and fire its personnel. This is ridiculous and insults the intelligence of the voter because properly managed school cafeterias do not cost the school district any money. If the cafeteria is losing money, then the board should not be packing free lunches for athletes on days of athletic contests. Whatever the case, the taxpayer's child should only have to pay about 30¢ for his lunch instead of 35¢ to pay for free lunches for the athletes.

In a reply to this letter your Board of Administration will probably state that these lunches are paid for from receipts from the games. But $20,000 in receipts doesn't pay for the $200,000 a year they have been spending on varsity sports while neglecting the wants of teachers.

You see we don't need an increase in the transportation tax unless the voters want to keep paying $50,000 or more a year to transport athletes home after practice and to away games, etc. Rest of the $200,000 is made up in coaches' salaries, athletic directors' salaries, baseball pitching machines, sodded football fields, and thousands of dollars for other sports equipment.

These things are all right, provided we have enough money for them. To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse.

If these things aren't enough for you, look at East High. No doors on many of the classrooms, a plant room without any sunlight, no water in a first aid treatment room, are just a few of many things. The taxpayers were really taken to the cleaners. A part of the sidewalk in front of the building has already collapsed. Maybe Mr. Hess would be interested to know that we need blinds on the windows in that building also.

Once again, the board must have forgotten they were going to spend $3,200,000 on the West building and $2,300,000 on the East building.

As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money.

I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?

Respectfully,
Marvin L. Pickering

425 P.2d 223
Benny Max PARRISH, Plaintiff
and Appellant,
v.
The CIVIL SERVICE COMMISSION OF the
COUNTY OF ALAMEDA, etc., et al.,
Defendants and Respondents.
S.F. 22429
Supreme Court of California,
In Bank.
March 27,1967.
57 Cal Rptr 623

TOBRINER, Justice.

In the present case an Alameda County social worker, discharged for "insubordination" for declining to participate in a mass morning raid upon the homes of the county's welfare recipients, seeks reinstatement with back pay on the ground that such participation would have involved him in multiple violations of rights secured by the federal and state Constitutions. He urges that his superiors could not properly direct him to participate in an illegal activity and that he could not, therefore, be dismissed for declining to follow such directions.

The county acknowledges that it has subsequently abandoned the method of mass morning raids to determine welfare eligibility and that such operations are now forbidden by the applicable state and federal regulations. Since these regulations were not in force at the time of the plaintiff's dismissal, however, we must determine whether he could properly refuse to participate in the welfare raids on the ground that they infringed rights of constitutional dimension.

[1-3] For the reasons set forth in this opinion we have decided that the county's failure to secure legally effective consent to search the homes of welfare recipients rendered the mass raids unconstitutional. We have determined further that, even if effective consent had been obtained, the county could not constitutionally condition the continued receipt of welfare benefits upon the giving of such consent. We have therefore held, for these two independently sufficient reasons, that the project in which the county directed the plaintiff to take part transgressed constitutional limitations. In light of plaintiff's knowledge as to the scope and methods of the projected operation, we have concluded that he possessed adequate grounds for declining to participate.

On November 21, 1962, the Board of Supervisors of Alameda County ordered the county welfare director to initiate a series of unannounced early-morning searches of the homes of the county's welfare recipients for the purpose of detecting the presence of "unauthorized males." The searches were to be modeled on a Kern County project popularly known as "Operation Weekend."

Neither in planning nor in executing the searches did the county authorities attempt to secure appropriate search warrants. The social workers who conducted the searches were not required or permitted to restrict them to the homes of persons whom they had probable cause to arrest, or even to the homes of those welfare recipients whose eligibility they had any reason to doubt. Indeed, as will later appear, the majority of persons whose homes were searched were under no suspicion whatever and were in fact subjected to the raid for that very reason.

The Alameda County searches, popularly and reportorially dubbed "Operation Bedcheck," commenced on Sunday, January 13, 1963, at 6:30 a.m. Although the county welfare department contained a 10 man fraud unit whose members ordinarily investigated all cases of suspected fraud, that unit could not adequately staff an operation of the sweep contemplated by the supervisors. Accordingly, despite the fact that the county's social workers did not ordinarily conduct fraud investigations, their services were necessary for this undertaking.

Since the social workers lacked experience with the techniques employed by the fraud investigators they received special instruction in the procedures to be followed. Their superiors instructed them to work in pairs with one member covering the back door of each dwelling while the recipient's own social worker presented himself at the front door and sought admittance. Once inside, he would proceed to the rear door and admit his companion. Together the two would conduct a thorough search of the entire dwelling, giving particular attention to beds, closets, bathrooms and other possible places of concealment.

Plaintiff was one of the social workers chosen to participate in the first wave of raids. Upon learning the nature of the proposed operation, he submitted a letter to his superior declaring that he could not participate because of his conviction that such searches were illegal. After plaintiff had explained his position to the division chief and the welfare director, he was discharged for insubordination.

[4] "Insubordination can be rightfully predicated only upon a refusal to obey some order which a superior officer is entitled to give and entitled to have obeyed." (Garvin v. Chambers (1924) 195 Cal. 212, 224, 232 P. 696, 701; Sheehan v. Board of Police Commrs. (1925) 197 Cal. 70, 78, 239 P. 844; Forstner v. City and County of San Francisco (1966) 243 A.C.A. 787, 794, 52 Cal.Rptr. 621.) Plaintiff contends that his superiors were not entitled to compel his participation in illegal searches and urges that such participation might have exposed him to severe penalties under federal law.[4]

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[4] One who, clothed with the authority of a state agency, invades and searches a home without a warrant and without probable cause to effect an arrest upon the premises may incur civil liability to the occupant under section 1983 of title 42 of the United States Code. (See Monroe v. Pape (1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; Cohen v. Norris (9th Cir. 1962) 300 F.2d 24, 31–32; Beauregard v. Wingard (S.D.Cal. 1964) 230 F. Supp. 167, 173–177.) Moreover, under section 242 of title 18 of the United States Code, wilful partici-

Accordingly we must determine, as the central issue in the present case, the constitutionality of the searches contemplated and undertaken in the course of the operation. By their timing and scope those searches pose constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and to the penumbral right of privacy and repose recently vindicated by the United States Supreme Court in Griswold v. State of Connecticut (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 . . . .

[5,6] . . . We conclude that the searches contemplated and undertaken in the course of the operation in the present case must be deemed unconstitutional unless the county can show compliance with the standards which govern searches for evidence of crime. The county concedes that it sought no warrants for these searches and that it lacked probable cause to arrest any person in any of the homes searched, but contends that the searches took place pursuant to effective consent, freely and voluntarily given. (People v. McLean (1961) 56 Cal.2d 660, 664, 16 Cal.Rptr. 347, 365 P.2d 403; People v. Burke (1956) 47 Cal.2d 45, 49, 301 P.2d 241.)

The alleged consent to search.

Our first task is to analyze the county's argument that the raids entailed no unlawful searches because the authorities instructed the searchers to refrain from forcing their way into any home. They were, instead, to report any refusal of entry to their superiors for such further action as might be deemed appropriate. The record indicates that, under the county's established practice, a reported refusal of entry could serve as a basis for terminating welfare benefits. The record also establishes that welfare recipients must depend to a remarkably high degree upon the continued favor of their social workers, who are vested with wide discretion to authorize or prohibit specific expenditures.[9] Accordingly, we must determine whether the threat of sanctions necessarily implicit in a request for entry under such circumstances vitiated the apparent consent which the searchers sought to secure from the occupants.

[7] Our case proceeds far beyond a mere request for admission presented by authorities under color of office. Thus we need not determine here whether a request for entry, voiced by one in a position of authority under circumstances which suggest that some official reprisal might attend a refusal, is itself sufficient to vitiate an affirmative response by an individual who had not been apprised of his Fourth Amendment rights. The persons subjected to the instant operation confronted far more than the amorphous threat of official displeasure which necessarily attends any such request. The request for entry by persons whom the beneficiaries knew to possess virtually unlimited power over their very livelihood posed a threat which was far more certain, immediate, and substantial.[11] These circumstances nullify the legal effectiveness of the apparent consent secured by the Alameda County searchers. Both this court and the Supreme Court of the United States have recently emphasized the heavy burden which the government bears when it seeks to rely upon a supposed waiver of constitutional rights. The county has not sustained that burden here.

The consequences of failure to consent

Even if we could conclude, however, that the consent secured by the Alameda County searchers constituted a knowing and fully vol-

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pation in a state-directed activity which infringes any right secured by the federal Constitution is a misdemeanor, punishable by a fine of not more than $1,000 or imprisonment for not more than one year, or both. (See United States v. Price (1966) 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267; Screws v. United States (1945) 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495; People v. Cahan (1955) 44 Cal.2d 434, 436, 282 P.2d 905, 50 A.L.R.2d 513.) (But see Note, Federal Judicial Review of State Welfare Practices (1967) 67 Colum.L.Rev. 84, 96 fn. 76.)

[9] This discretion, limited by no standard and subject to no appeal, heightens the peril faced by any recipient bold enough to deny entry. Not surprisingly, none of the recipients were so daring here. (See Respondent's Reply Brief, p. 10.) In Shelton v. Tucker (1960) 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, the court struck down a statute requiring teachers to report their membership in any organization, noting that "[s]uch interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain." (364 U.S. at p. 486, 81 S.Ct. at p. 251.) (Cf. Note, op. cit. supra, 67 Colum.L.Rev. 84, 93).

[11] In Lynumn v. State of Illinois (1963) 372 U.S. 528, 534, 83 S.Ct. 917, 920, 9 L.Ed.2d 922, the United States Supreme Court regarded a threat that "state financial aid for [the defendant's] children would be cut off" as an important element of coercion in determining the voluntariness of defendant's confession.

untary waiver of Fourth Amendment rights, that conclusion would not establish the constitutionality of the operation involved in this case. That operation rested upon the assumption that a welfare agency may withhold aid from recipients who do not willingly submit to random, exploratory searches of their homes; from its inception, the operation contemplated the use of such searches to threaten the withdrawal of welfare benefits from anyone who insisted upon his rights of privacy and repose. In light of the resulting pressure upon welfare recipients to sacrifice constitutionally protected rights, the ultimate legality of the operation in which the plaintiff refused to participate must turn on whether the receipt of welfare benefits may be conditioned upon a waiver of rights embodied in the Fourth Amendment.

In Bagley v. Washington Township Hospital Dist. (1966) 65 A.C. 540, 55 Cal.Rptr. 401, 421 P.2d 409, and Rosenfield v. Malcolm (1967) 65 A.C. 601, 55 Cal.Rptr. 505, 421 P.2d 697, this court recently reviewed the so-called "doctrine of unconstitutional conditions," concluding that the power of government to decline to extend to its citizens the enjoyment of a particular set of benefits does not embrace the supposedly "lesser" power to condition the receipt of those benefits upon any and all terms.

[8] When, as in the present case, the conditions annexed to the enjoyment of a publicly-conferred benefit require a waiver of rights secured by the Constitution, however well-informed and voluntary that waiver, the governmental entity seeking to impose those conditions must establish: (1) that the conditions reasonably relate to the purposes sought by the legislation which confers the benefit; (2) that the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit. (Bagley v. Washington Township Hospital Dist. supra, 65 A.C. 540, 542, 546–548, 55 Cal.Rptr. 401, 421 P.2d 409; Rosenfield v. Malcolm, supra, 65 A.C. 601, 604, 55 Cal.Rptr. 505, 421 P.2d 697; see Note, op. cit. supra, 67 Colum.L.Rev. 84, 101 & fn. 104; cf. Symposium on the Griswold Case and the Right of Privacy, op. cit. supra, 64 Mich.L.Rev. 197, 251.) . . . .

In any event the instant operation does not meet the last of the three requirements which it must satisfy: So striking is the disparity between the operation's declared purpose and the means employed, so broad its gratuitous reach, and so convincing the evidence that improper considerations dictated its ultimate scope, that no valid link remains between that operation and its proferred justification.

We recall the crucial fact that the county authorities deliberately declined to restrict their searches to the houses of those recipients as to whom they entertained some reason, however remote, to suspect fraud. . . .

Not only has the county failed to demonstrate that the scope of the raids was closely correlated to the achievement of some legitimate end, but alternate means for the detection of fraud less subversive of constitutional rights were available to the county. For example, the welfare director testified that in investigating suspect cases his workers would maintain an external watch "[u]ntil such time as there [was] sufficient indication to warrant the request to enter the home and look through it." No one has explained why such safeguards, accorded in *suspect* cases, were denied the *non-suspect* persons subjected to the operation. The foregoing factors indicate so marked a lack of congruence between the scope of the operation and the legitimate goal of reducing welfare fraud as to deprive that procedure of any constitutional justification. . . .

The grounds for plaintiff's refusal to participate in the search

At oral argument before this court, county counsel did not seek to establish the constitutionality of the searches but urged that, whatever the legal status of the operation, the county could still discharge plaintiff because, at the time he refused to participate in it, he had not yet learned of the unconstitutional nature of the contemplated searches.

The record supports no such claim. On the contrary, the uncontradicted evidence establishes that prior to plaintiff's refusal to participate, he had been advised of the purpose, timing, and scope of the searches, and of the fact that at least one-half of the homes to be searched would be chosen at random from non-suspect cases. Moreover, in explaining to his superiors the reasons for his unwillingness to participate, plaintiff repeatedly stated that he believed the county could not legally search the homes of those known to be under no suspicion.

The board of supervisors issued its directive concerning the initiation of the operation on November 21, 1962. Thereafter, on January 3, 1963, the plaintiff attended a briefing at which he and the other social workers were told about the objectives of the operation, its timing and scope, and the strategy of operating in pairs. At this meeting the social workers were also instructed to prepare their lists of homes for the proposed search and to choose at least one-half of the cases from among persons whom they did not suspect.

After attending this briefing, plaintiff discussed his doubts with his immediate superior. The superior, appearing on behalf of the county, gave the following account of the ensuing conversations: "We discussed the whole issue in great detail for at least a week * * *. His final reply, after a week's preliminary discussion [was], 'This I cannot do.'* * * He felt that he did not wish to go on these so-called random visits, as this would appear that his clients would be guilty of something that we have no proof of * * *. He did not object to suspect cases, however, his objection was lying in the realm of the random cases as he felt this assumed a guilt on the part of the recipient that had not been proven * * *. I asked him whether he felt that his handicap would interfere with his making these calls [plaintiff is only partially sighted] or whether it was possibly one of transportation due to the hour involved; however, he felt that this was a matter of principle with him and stated, 'This, I cannot do.' * * * We discussed it a whole week trying to come up with some answer * * * to evaluate all aspects and we were unable to come to an agreement, and [hence] the subsequent outright refusal."

After these conversations proved futile, plaintiff submitted to the division chief a memorandum citing his reasons for declining to participate in the searches. Foremost among the reasons listed was plaintiff's conviction that the searches indicated "the presumptive guilt of all recipients" and constituted "an invasion of the privacy of recipients."

Since the record establishes that the information known to plaintiff at the time he made his decision gave him reasonable grounds to believe that the operation would be unconstitutional, that he did so believe, and that the operation, as ultimately conducted, was in fact unconstitutional, we need not consider how we would decide this case had any one of these elements been missing.

[9] We fully recognize the importance of ferreting out fraud in the inexcusable garnering of welfare benefits not truly deserved. Such efforts, however, must be, and clearly can be, conducted with due regard for the constitutional rights of welfare recipients. The county welfare department itself has now abandoned the technique of investigation which it pursued here; we may thus rest assured that it will develop other more carefully conceived procedures. It is surely not beyond the competence of the department to conduct appropriate investigations without violence to human dignity and within the confines of the Constitution.

The judgment is reversed and the cause is remanded to the trial court with directions to enter judgment in accordance with this opinion.

TRAYNOR, C.J., and PETERS, MOSK, BURKE and PEEK, JJ.

In re Appeal of Ocania CHALK.

Supreme Court of Pennsylvania.
Jan. 7, 1971.
Pa., 272 A. 2d 457

OPINION OF THE COURT

ROBERTS, Justice.

This is an appeal from a decision of the State Civil Service Commission, suspending appellant, who is a public assistance caseworker, for ten days without pay. The Commission, by a two-to-one vote, found that certain remarks made by appellant at a public meeting of a group called the "Public Assistance Committee" violated two sections of the Department of Public Assistance Bulletin 659. These sections provide that employees of the Department should "conduct themselves in a manner that will bring credit to the Commonwealth," and should "never * * * engage in any activity which would cause embarrassment or merit unfavorable publicity to the Department or the Commonwealth." The remarks made by appellant, the Commission found, "were critical of personnel and policies of the public assistance administration of the York County Board." The dissenting Commissioner noted that "appellant urged public assistance recipients to get on caseworkers' backs and demand their rights; he stated some caseworkers failed to accord recipients dignity and inform them of their rights of appeal and * * * he exhorted recipients, quoting Frederick Douglass to 'agitate, agitate, agitate.' "

Following the Commission's decision, appellant prosecuted this appeal. He urges that his speech was constitutionally protected by virtue of the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 7, of the Pennsylvania Constitution, P.S., and hence that his suspension was improper. We agree.

There can be no doubt of "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment * * *." New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964). It has long been recognized that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means * * * is a fundamental principle of our constitutional system." Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 536, 75 L.Ed. 1117 (1931). The importance of the First Amendment was perhaps most eloquently stated by Mr. Justice Brandeis:

> Those who won our independence believed that * * * the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. * * [T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U.S. 357, 375–376, 47 S.Ct. 641, 648, 71 L Ed. 1095 (1927) (concurring opinion) (footnote omitted).

In the face of this authority the Commission places a famous statement of Mr. Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517–518 (1892). This statement, urges the Commission in its brief, "represents the fundamental rule of constitutional law in this area." We cannot agree.

As Mr. Justice Holmes himself once observed: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Hyde v. United States, 225 U.S. 347, 391, 32 S.Ct. 793, 811, 56 L.Ed. 1114 (1912) (dissenting opinion). In line with this admonition, we must recognize that Mr. Justice Holmes' statement is from a past century, predating the tremendous increase in government activity and employment. See Van Alstyne, The Demise of the Right-Privilege Distinction, 81 Harv.L. Rev. 1439, 1461–62 (1968). In accord with these changes, it is today a well established principle that constitutional rights are no longer forfeited simply because one is a policeman, see Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970); or a lawyer, see Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967); or a teacher, see Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); or even a lifeguard, see Donovan v. Mobley, 291 F.Supp. 930 (C.D.Cal.1968).

These public occupations "are not relegated to a watered-down version of constitutional rights." Garrity v. New Jersey, 385 U.S. at 500, 87 S.Ct. at 620. In reply to the premise underlying Mr. Justice Holmes' statement, the United States Supreme Court has noted: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." Sherbert v. Verner, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963). See generally Note, Another Look at Unconstitutional Conditions, 117 U.Pa.L.Rev. 144 (1968). Indeed, as the United States Supreme Court has unequivocally stated, " 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' " Keyishian v. Board of Regents, 385 U.S. at 605–606, 87 S.Ct. at 685.

It is of course true that the State does have a greater interest in the utterances of its employees than it has in those of its citizenry in general. Recognizing this, the United States Supreme Court has set out the standards which must now guide us in this sensitive area: "The problem in any case is to arrive at a balance between the interests of the * * * [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. at 568, 88 S.Ct. at 1734–1735.

Applying this test to the instant case, we cannot say that the Commission has weighed the balance properly. While the Commission found that "the remarks of appellant were detrimental to the public assistance administration in York County," the Commission has given us no indication of how this finding was arrived at. Nor does our independent review of the record disclose any. The appointing authority as the dissenting Commissioner noted, did not produce any evidence of the harmful effects of the speech, compare *Pickering*, 391 U.S. at 570, 88 S.Ct. at 1736. Indeed, as the Commission stated, six witnesses testified that appellant's remarks "were beneficial to those present." Nor has the appointing authority shown, for example, that appellant's remarks were defamatory, see Meehan v. Macy, 129 U.S. App.D.C. 217, 392 F.2d 822 (1968); cf. New York Times v. Sullivan, supra; or that his conduct in his job was so antagonistic as to amount to borderline insubordination, see Lefcourt v. Legal Aid Society, 312 F.Supp. 1105 (S.D.N.Y.1970).

In sum, the York County Board has not shown that its interest in limiting appellant's opportunity "to contribute to public debate" is "significantly greater than its interest in limiting a similar contribution by any member of the general public." *Pickering*, 391 U.S. at 573, 88 S.Ct. at 1737. Appellant's remarks were a criticism of how a governmental institution was functioning. Indeed, as a member of that institution, he had a unique, and valuable, perspective from which to view it. Whether his statements were true, or false, need not concern us, for this is a question which could not meaningfully be answered by either the York County Board, or the Civil Service Commission. Appellant was addressing himself to matters of public policy, where "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). His statements may have been upsetting, but the Commission could not, without more, suspend him from his job for uttering them.

The order of the Civil Service Commission is reversed.

Joseph L. DONAHUE, Plaintiff-Appellee,
v.
Patrick STAUNTON, Individually And As Chicago Area Zone Director, et al., Defendants-Appellants.
No. 71-1160
United States Court of Appeals,
Seventh Circuit.
Argued Jan. 24, 1972.
Decided July 6, 1972.
Rehearing and Rehearing En Banc
Denied Sept. 15, 1972.
Certiorari Denied Feb. 26, 1973.
See 93 S.Ct. 1419.
471 F.2d 475

Before SWYGERT, Chief Judge, HASTINGS, Senior Circuit Judge, and SPRECHER, Circuit Judge.

HASTINGS, Senior Circuit Judge.

Joseph L. Donahue brought this action against the defendants Patrick Staunton, individually and as Chicago Area Zone Director of the Illinois Department of Mental Health; H. C. Piepenbrink, individually and as Manteno State Hospital Superintendent; and John F. Briggs, individually and as Director of the Illinois State Department of Mental Health, alleging that defendants had discharged plaintiff from his position as Chaplain at the Manteno State Hospital in abrogation of his right to freedom of speech guaranteed by the First and Fourteenth Amendments to the Federal Constitution. He sought relief pursuant to Title 42, U.S.C.A. § 1983. Jurisdiction was established pursuant to Title 28, U.S.C.A. § 1343.

This case was tried to the court without a jury. The court filed its findings of fact and entered conclusions of law favorable to plaintiff and rendered judgment against the defendants in the amount of $2,000 as punitive damages, with interest; out-of-pocket expenses in an amount to be later determined; attorney fees of $750; and costs. Affirmatively, defendants were ordered to offer plaintiff full and unconditional reinstatement to his former position and, in the event he accepted such reinstatement, an injunction would be issued restraining and enjoining defendants, their agents and successors, from interfering with, coercing or discriminating against plaintiff in the exercise of his protected rights of free speech. Defendants have appealed.

Plaintiff Father Donahue, a Roman Catholic Priest, was appointed Catholic Chaplain at Manteno State Hospital on July 14, 1964, and served in such capacity until his discharge on December 4, 1969. As Chaplain, plaintiff received a salary which he, under his vow of poverty, forwarded to the Order of St. Viator, withholding sufficient funds to provide for his daily needs. In this capacity plaintiff was charged with serving the spiritual needs of the patients and employees at Manteno, along with sundry other duties, including speaking at public functions to explain the operations of the hospital.

Along with all other employees of the hospital, plaintiff was annually rated in the performance of his duties. Until the final report, prepared after plaintiff's discharge, he was always rated either "good" or "excellent" on seven separate categories of duties and responsibilities. The annual review covering the period from July 14, 1968 to July 14, 1969 (five months prior to his discharge), prepared by plaintiff's immediate superior, contains the following analysis of his performance:

> Father Donahue energetically and conscientiously discharges his duties as a spiritual advisor and counselor to the patients of Catholic faith at M. S. H. He has extremely favorable rapport with the patients to whom he provides the chaplaincy services, and at all times considers what is best for the patient.
>
> * * * * * * *
>
> Father Donahue constantly strives to bring about better conditions at M. S. H. and in doing so apprises the staff of changes that should be initiated in order to correct situations which are not acceptable for the care and treatment of the mentally ill. His ability to communicate with others concerning these problems and the presentation of his solutions leave little to misinterpretation. His strong initiative and precise communicating among employees and patients are attributes which make him an asset to M. S. H.

Soon after plaintiff was assigned to Manteno, the hospital entered a period of transition. New policies were instituted so that the patients were no longer kept locked up and under strict security, no longer were the sexes separated, and the hospital's employment practices were decentralized. Plaintiff approved of these enlightened and progressive policies in theory but became alarmed with the method of their implementation. It was the consensus that such new programs would require more supervision than formerly provided. He was gravely concerned that the supervision was inadequate.

In 1966 plaintiff expressed his criticism and concern in a union newspaper column which he authored; in a public speech to a convention of the Illinois State Federation of Labor; and in other avenues of public expression.[1] Following the Board's report, *supra* note 1, defendant Piepenbrink in 1967 appointed plaintiff to a committee with the responsibility of developing a hospital policy relating to the problems of promiscuity.

It appears from the record that there was a lull in the plaintiff's public criticism of the hospital operations. Later, frustrated by what he felt was a lack of progress in resolving the problems of the hospital, plaintiff in the fall of 1969 began another campaign of public criticism. His public statements included a speech by him critical of the operations of the hospital, which was reported in a local newspaper on October 20, 1969; on October 27, 1969, the same newspaper printed a letter to the editor written by plaintiff in which he criticized as impractical a particular program of the hospital; and on November 13, 1969, the same newspaper published a paid advertisement authored by plaintiff and one Thomas Nayder which set forth 12 specific incidents of negligence or improper activity at the hospital.

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[1] On September 9, 1966, the Governor of Illinois called for an investigation by the Board of Mental Health Commissioners into the public criticism of the Manteno State Hospital. The main impetus for this investigation seems to have come from picketing by off-duty hospital employees who publicly expressed concern over the moral climate at the hospital.

The Board issued a report to the Governor on October 20, 1966, and found that sexual behavior of all types would undoubtedly be less if there was a more adequate staff to supervise the patients under the more permissive policies. However, the Board felt that sexual morality was not the basic issue but rather that Manteno was in transition and operating a gigantic institution on a skimpy budget which was designed before most of the new programs began.

This report in many respects is consistent with the concern expressed by plaintiff in his public statements, although the report was critical of public criticism itself. In the newspaper report of plaintiff's public speech it was stated:

The new programs introduced by the Illinois Department of Mental Health are fine but it's like buying an expensive car when you can only afford a wheelbarrow. The programs need workers and the patients need constant examination, weeks and weeks of intensive treatment and constant care.

But he added, because there are insufficient employees and because 'many employees are unqualified' to carry out such programs, the result has been unsupervised wards, inadequate care, and illicit sexual activity.

The advertisement appears to be the most critical statement made by the plaintiff and one of the significant factors leading to his discharge. In relevant part, the advertisement charged that the Director of the Illinois Mental Health Department, the Superintendent of Manteno State Hospital and the directors of certain programs at the hospital were all "laymen," and that there was neglect in the preparation and funerals of the dead, little or no effort on the part of authorities to prevent runaways and improper treatment and delay in treatment of patients. He questioned the legality of a self-medication program and asserted that the hospital lacked certain facilities. He charged there was mixing of untidy patients with tidy patients, that the hospital issued birth control pills to highly promiscuous patients and other incidents of neglect.

Although the truth or falsity of these allegations was not proven at trial, we note that many of the accusations came from reports of the "Pharmacy & Therapeutics Committee Meetings" at Manteno State Hospital and other inter-office memoranda. Also, plaintiff testified, and we presume from the court's findings that it was credited, that he checked every charge he made either by direct observation, conversation with "reliable sources, doctors, nurses, security men and aides," or through a number of memoranda which came to his office. He also testified that he never knowingly published or stated anything that was false.

Letters were also written by plaintiff to the Governor in which he stated his purpose was "to relate some of [the] happenings" at the hospital. Copies of such letters were sent to defendant Briggs. In addition, plaintiff encouraged others to write to the Governor to protest what he believed to be the deplorable conditions at Manteno.

Defendants assert that the plaintiff's statements were made without checking their validity and contained falsehoods and half-truths which were detrimental to the operation of the hospital and the well-being of the patients. The termination slip handed to plaintiff stated he was discharged for cause, to wit:

> In the best interest of the patients and staff at Manteno Hospital, the Chicago Area Zone Director, Patrick Staunton, M. D., and Manteno State Hospital Superintendent H. C. Piepenbrink, have decided on this action. This priest has consistently, and without checking validity of criticism, made public charges against the treatment programs of this facility which have little basis in fact and which are detrimental to the care and treatment of the patients and can no longer be tolerated by the management of one of its employees.

Hence the principal issue we face here is whether the discharge of plaintiff by the named defendants violated his First Amendment right to freedom of speech. Ancillary issues are: whether plaintiff was an employee of the Manteno State Hospital; whether the Illinois statutory scheme for the discharge of employees was improperly held unconstitutional; and whether the remedy afforded was proper.

We will assume for the purposes of this opinion that some of the allegations made by the plaintiff were false or misleading. However, upon our examination of the record, we find that at the time of their issuance they were reasonably believed to be true by the plaintiff and were not knowingly false and recklessly made. . . .

[1] . . .It is conceded that plaintiff's position with the hospital was "exempt" under the Illinois "Personnel Code," *supra*, and that he could be discharged at his employer's discretion without a civil service hearing.[3] . . .

[2] . . .We finally come to the crucial issue, *viz.*, whether the defendants by discharging plaintiff deprived him of his First and Fourteenth Amendments rights to freedom of speech.

The leading Supreme Court case involving constitutional rights of public employees is Pickering v. Board of Education etc., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Under the particular facts in that case, the Court, applying the New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), standard for defamation against public officials, held: "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." 391 U.S., at 574, 88 S.Ct., at 1738.

[3] *Pickering* was a refinement of the idea that public employment may not be conditioned

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[3] The district court specifically stated: "I have no quarrel with your [defendants'] right to discharge noncivil service employees peremptorily providing that their federal civil rights and constitutional rights have not been violated. I have no quarrel with that being the law."

upon the surrender of constitutional rights. As was stated by the Court in Keyishian v. Board of Regents, 385 U.S. 589, at 605–606, 87 S.Ct. 675, at 685, 17 L.Ed.2d 629 (1967), " '***the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' " Taking this lead, we announced in Muller v. Conlisk, 7 Cir., 429 F.2d 901, at 904 (1970): "It may no longer be seriously asserted that public employees, including policemen, have no right to criticize their employer."

The reason for the rule announced in *Pickering* was explained in Kiiskila v. Nichols, 7 Cir., 433 F.2d 745, at 749 (1970). "A citizen's right to engage in protected expression or debate is substantially unaffected by the fact that he is also an employee of the government and, as a general rule, he cannot be deprived of his employment merely because he exercises those rights. This is so because dismissal from government employment, like criminal sanctions or damages, may inhibit the propensity of a citizen to exercise his right to freedom of speech and association." The court elaborated: "To protect society's interest in uninhibited and robust debate the first amendment demands that government be prohibited from inhibiting or suppressing speech by indirection through discharge of a government employee when the same objective could not constitutionally be achieved by criminal sanctions or other direct means." *Id.*

This is not to say that a public employer or State may under no circumstances discharge an employee for his public statements. *Pickering* provided, 391 U.S. at 569, 88 S.Ct. at 1735: "Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." Rather the Court felt: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. at 1734.

[4] Interests of the State which, if strong enough, the Court in *Pickering* felt might lead to a different result in the future are: (1) maintaining discipline or harmony among co-workers; (2) need for confidentiality; (3) employee's position may be such that his false accusations may be hard to counter because of the employee's presumed greater access to the real facts; (4) statements which impede the employee's proper performance of his daily duties; (5) statements so without foundation as to call into question his competency to perform the job; and (6) a close and personal working relationship between the employee and supervisor which called for personal loyalty and confidence.

[5] Defendants argue that plaintiff's accusations were so extensive and so critical that they impeded the performance of his duties, namely, to address "professional and lay groups to promote understanding of problems and obligations concerning patients" and "interpret the institution's problems and policies to the public." However, we do not find that this was such a critical responsibility of a Chaplain as to give the State a strong enough interest to interfere with the plaintiff's free speech rights. This is especially so since plaintiff was not even evaluated on this function until May 13, 1969, and then he was rated "good." Further, defendants were not able to prove that the plaintiff's vociferousness hindered him in the performance of his religious and spiritual duties toward the patients at Manteno.

It could be argued that plaintiff's exaggerated comments, because he is a priest, were given greater credence by the general public than would those of a non-clerical employee. This may be true, but defendants have not shown that they were hindered in any way in responding to the accusations of plaintiff; in fact, at several points they specifically chose not to respond . . .

[6] In sum, we have considered the countervailing factors mentioned in *Pickering* and find them inapplicable here. We conclude and hold in the case at bar that the interest of society in "uninhibited and robust debate" on matters of public concern, such as mental health care, and plaintiff's individual interest in being free to speak out on matters of concern to him, outweigh those of the State as an employer. This is a proper guarantee of "the public's right to know." It follows that the actions of defendants, as agents of the State, in dismissing plaintiff, violated his First and Fourteenth Amendments rights to free speech . . .

[7] . . . In this regard, defendants claim that since the court below did not specifically find

that they acted in bad faith, they are entitled to immunity from all damages. However, it is a necessary implication of the court's decision and judgment against the defendants that they acted without justification in the case at bar. "At best, defendants' qualified immunity in this case means that they can prevail only if they show that plaintiffs were discharged on justifiable grounds. Thus, here a successful defense on the merits merges with a successful defense under the qualified immunity doctrine." *McLaughlin* at 290–291 . . .

[9] Defendants question the award of *punitive* damages. Their concern is without foundation. Since we have found that defendants acted in bad faith, the award of punitive damages was within the sound discretion of the trial court . . .

[12, 13] . . . For the foregoing reasons, the judgment is affirmed as modified.

Affirmed as modified.

James H. McCLELLAND,
Appellant,
v.
COMMONWEALTH of Pennsylvania, STATE CIVIL SERVICE COMMISSION,
Appellee.

Commonwealth Court of Pennsylvania.
Argued June 4, 1974.
Decided July 17, 1974.
Pa., 322 A.2d 133

OPINION

BLATT, Judge.

On Saturday, April 14, 1973, Secretary of Public Welfare Helene Wohlgemuth inspected the Polk State School and Hospital (Polk), a Commonwealth institution for the retarded which is administered by the Department of Public Welfare (DPW). Polk is a large institution, approximately 75 years old, with a rated capacity of 1,800 patients and a staff of 1,850 employees. At the time in question, it had a resident population of 2,800 of whom possibly two-thirds were severely or profoundly retarded, while the remainder were either border-line, mildly or moderately retarded. During the course of her inspection, the Secretary observed "cages" or "pens," in one of which she saw a person confined. It was subsequently determined that Polk had five such pens, two of which had tops and were approximately five feet square and about five feet high. The other three pens were larger in area and had no tops. All were allegedly used only for the immediate control of mental retardates with psychotic tendencies who became hyperactive and thus constituted a danger to themselves as well as to other patients and to attendants. Secretary Wohlgemuth orally directed Superintendent James H. McClelland to remove the pens, which he agreed to do at once, and they were removed.

As a result of this visit, Secretary Wohlgemuth decided to remove Dr. McClelland as superintendent, and by letter dated April 16, 1973, she notified him of his dismissal effective May 1, 1973. The letter to Dr. McClelland set forth the following charges as the basis for his removal:

> 1. The cruel, degrading, and inhumane conditions which I personally observed during my visit on April 14, 1973. This refers specifically to the locked 'cages' and pens in which you authorized the confinement of patients.
> 2. Severe and chronic deficiencies with respect to the proper training and orientation of professional and nonprofessional staff in the appropriate care and treatment of mentally retarded residents.

Dr. McClelland, who had been employed at Polk for approximately 32 years, appealed his dismissal to the State Civil Service Commission (Commission). After extensive hearings, the Commission, with one commissioner dissenting, upheld the removal, and Dr. McClelland has now appealed to this Court. . . .

[3] . . . In our consideration of the two charges of which Dr. McClelland was given adequate notice, we must keep in mind that, pursuant to Section 807 of the Civil Service Act, Act of Aug. 5, 1971, P.L. 752, as amended, 71 P.S. § 741.807, Dr. McClelland could be removed only for "just cause." We have stated previously that "the legislative intent relating to one's relationship with the classified service turns upon a merit concept. This means that any 'personnel action' carried out by the Commonwealth is to be scrutinized in the light of such merit criteria, as has the party failed to properly execute his duties, or has he done an act which hampers or frustrates the execution of same. The criteria must be job-related and in some rational and logical manner touch upon competency and ability". Corder v. Civil Service Commission, 2 Pa.Cmwlth. 462, 467, 279 A.2d 368, 371 (1971).

[4] The first charge against Dr. McClelland involves his use of pens to restrain certain residents. Such use, we believe, would constitute just cause for dismissal if it were carried out in violation of departmental regulations or stan-

dards or was so contrary to accepted practices of the profession as to create the "cruel, degrading, and inhumane conditions" said to exist. A review of the record, however, reveals that few standards which would be applicable to this situation were at any time prescribed by the DPW. The only standards apparently prescribed were: (1) the standards set forth in Wyatt v. Stickney, 344 F.Supp. 387 (M.D.Ala., 1972) and (2) the "Standards for Residential Facilities for the Mentally Retarded", prepared by the Joint Commission on Accreditation of Hospitals (JCAH). In Appendix A to *Wyatt, supra,* it was provided that:

> Physical restraint shall be employed only when absolutely necessary to protect the resident from injury to himself or to prevent injury to others. Restraint shall not be employed as punishment for the convenience of staff, or as a substitute for a habilitation program. Restraint shall be applied only if alternative techniques have failed and only if such restraint imposes the least possible restriction consistent with its purpose. 344 F.Supp. at 401.

Similarly, Item 2.1.8.6 of the JCAH Standards provides:

> Except as provided in Item 2.1.8.9 [which pertains to behavior modification programs], physical restraint *shall* be employed *only* when absolutely necessary to protect the resident from injury to himself or to others, and restraint *shall not* be employed as punishment, for the convenience of staff, or as a substitute for program." (Emphasis in original.)

Thereafter, Item 2.1.8.6.2 specifically provides:

> Totally enclosed cribs and barred enclosures shall be considered restraints.

Clearly these standards do not prohibit all use of restraints even though the pens here in question would meet the JCAH Standard definition of restraints. Only if such restraints are used contrary to the purposes permitted, therefore, would such use constitute a violation of these standards, yet there is no competent evidence on the record to show that the pens at Polk were so misused.

The DPW has not cited any other specific standards which would be applicable here and with which Dr. McClelland was specifically directed to comply. In fact, the Commissioner of Mental Health, who visited Polk in 1969 and 1972, observed the pens, and never indicated that he disapproved of their use. Not only, therefore, did Dr. McClelland have no reason to believe that he was acting contrary to the desires of the DPW, but the guidelines which he received as well as the failure of the Commissioner of Mental Health to criticize his practice gave him every reason to believe that he was acting consistently with the desires of the DPW. Moreover, when he was eventually directed by Secretary Wohlgemuth at the time of her visit to remove the pens, he complied without hesitation.

[5] The DPW urges, however, that the use of these pens is so outmoded and so contrary to all accepted practices in the treatment of the mentally retarded that the approval of their use even without any directive or guideline prohibiting such use constitutes just cause for Dr. McClelland's dismissal. Only one expert witness for the DPW, Dr. Frank J. Menolascino, testified that he found the use of these pens to be inhumane. All other expert witnesses for the DPW stated only, at the most, that the use of such pens would be inappropriate, at least for their own institutions, none of which had the serious conditions of overcrowding and understaffing which prevailed at Polk. The most which the evidence indicates is that there is a difference of professional opinion as to the propriety of using pens to control hyperactive residents and to protect them from harming themselves and others. There was, of course, no evidence that pens were used for punishment or for any other admittedly improper use. We cannot, therefore, hold that the DPW has carried its burden of presenting sufficient evidence that the use of the pens either created "cruel, degrading, and inhumane conditions" or could constitute just cause for Dr. McClelland's dismissal.

[6] Nor do we believe that sufficient evidence has been offered to substantiate the second charge against Dr. McClelland, which concerns the proper training and orientation of Polk personnel. Here the Commission relied completely upon testimony offered by Secretary Wohlgemuth and Dr. Menolascino. Secretary Wohlgemuth's testimony was to the effect that she had spoken to one male employee at Polk during her visit, who told her that he had not yet received his training. Dr. Menolascino's testimony was critical of procedures and management methods allegedly in use at Polk and he suggested what he considered to be more appropriate alternatives. He also testified, however, that he had never visited Polk personally, had never spoken to Dr. McClelland or to any member of the Polk staff and knew nothing about Polk's training, educational, medical or rehabilitation programs.

As to whether or not pens of any kind should ever be used at Polk, or should ever have been used, we express no opinion. Nor do we express any opinion as to whether or not the training of personnel at Polk was adequate. We must conclude, however, that the evidence offered by the DPW before the Commission was insufficient to prove that either of the charges made against Dr. McClelland constituted just cause for his dismissal. We must also conclude, therefore, that the Commission abused its discretion in approving his dismissal.

For the above reasons, therefore, we issue the following:

ORDER

Now, July 17, 1974, the appeal of Dr. James H. McClelland is sustained and he is ordered reinstated as Superintendent of Polk State School and Hospital with back pay from May 1, 1973.

H. RUTHERFORD TURNBULL, III

Accountability: An Overview of the Impact of Litigation on Professionals

□ It is now common to hear discussions about governmental accountability, its theoretical basis, the rights of consumers and clients in enforcing it, the strategies for securing it, and the consequences of abiding by it. In part, these discussions have been provoked by and are a response to frontier opening judicial acknowledgments of rights to education and treatment. They also are a response to court decisions (a) holding professionals personally liable in damages for treating patients in mental health and mental retardation institutions in professionally unacceptable ways or for refusing to treat them at all and (b) establishing and enforcing the right to treatment and education. To the extent that litigation has been the catalyst for imposing a principle of accountability to consumers and the public at large on professionals involved with the handicapped, it has been and will continue to be welcome, desirable, and even necessary.

THE ISSUES

To know what accountability means is far from a difficult task. To make a person accountable is to challenge or contest him, or to hold him answerable; that which is accountable is capable of being explained; he who is accountable is held answerable.

To appreciate what accountability means, however, is a far more difficult task. Accountability raises a myriad of principal issues: Who holds whom responsible, for what action, according to what standards, under what theories of law, how, and for what reasons of policy. And there are a host of ancillary questions: What types of accountability are now required and are likely to be required in the future? What types of accountability should the law require? How far does or should accountability extend to a claimant of it? What interests in accountability are asserted by various claimants? How are the claimants' sometimes conflicting claims to be balanced against each other? Finally, how is accountability to be extended to various aspects of the client-provider relationship?

Viewed from the perspective of the law, none of these issues is free from immense complexity, although the answers to the principal issues seem simple. Who holds whom accountable? The client consumer holds the professional service provider accountable, responsible, and liable. For what action? For the manner in which the professional deals with, or fails to deal with, the client. According to what standards? According to standards developed in law for protecting the rights of other disabled persons, such as prisoners and minors, and also according to standards developed by professionals working with the handicapped. Under what theories of law? Primarily under the constitutional principles of due process and equal protection, as embodied in the 5th and 14th Amendments, and under a new application of the doctrine of cruel and unusual punishment under the 8th Amendment. How? By guaranteeing due process, by ordering remedies of violations of legal rights, and by requiring the professionals (and thus governments and the body politic) to treat disabled persons as equals and on equal terms. For what reason of policy? For the reason that, although humans are divisible into groups, human and constitutional rights are not.

UNDERLYING PRINCIPLES

Behind these complex judicial responses lie two major themes: First, human and constitutional rights are not divisible and may not legally be parceled out according to the mental, emotional, or physical attributes of a person; and, second, the unequal person is entitled to equal treatment under the law.

Also behind these complex judicial responses lies the engrained belief of society, enforced at law, that persons should be answerable to each other for what they do to each other. In the law of trusts, the "prudent man" rule requires the caretaker of another's property to account to its owner for his actions. In the law of torts, the "reasonable man" rule requires that one person answer in damages to another for acting in an unreasonable way toward him and thereby injuring him. In the law of crimes, the right of the public to apply sanctions requires that persons who commit crimes against the public be punished, rehabilitated, and prevented from doing so again.

Although the concept of accountability is not new to the law, its present application to the providers of service to the handicapped is of recent origin, thus prompting the question, why? The reasons, of course, are manifold. Professionals recently have made such significant advances in understanding and treating disabled persons that they are thereby enabled and thus required to deal in new ways with respect to their clients. The public is newly aware of the needs of the disabled. Law reformers are engaged in the continuation of old civil rights battles on new battle grounds. Finally, this is an age of egalitarianism, an age that is capable of adopting as its tenets the indivisibility of human and constitutional rights and the essential equality of all persons.

THE RIGHT TO TREATMENT

The court decisions establishing the right to treatment have two principal goals: the improvement of the condition of the handicapped person himself, and the improvement of the conditions in which the person is treated or confined. The unstated predicate of these decisions is that an improvement in the person will result from an improvement in his environment. The unstated implication is that neither type of improvement can occur unless professionals can be held to account for at least the environmental conditions and their professional relationships to their clients.

Three Legal Theories

To hold the professionals accountable, the courts have resorted to three well known legal theories. The first is procedural due process, which guarantees a person the right and a meaningful opportunity to protest and to be heard before government may take action with respect to him. This is the rule that the government must proceed fairly before it acts (usually applied to commitment of the mentally ill or retarded). Second is substantive due process, which signifies that there are certain rights and privileges that a state may not arbitrarily take from a citizen (such as the deprivation of liberty through confinement) and that the state may not act unreasonably, arbitrarily, or capriciously in dealing with a citizen. Third is equal protection, which guarantees to the handicapped person the same rights and benefits all other citizens have with respect to their government (including all of the constitutional rights of procedural and substantive due process) unless the withholding of the rights or benefits by the state is for a valid reason that justifies the state in singling out the handicapped person for differential treatment.

These theories are applied solely by reason of the fact that the handicapped person is confined by the state and is in its custody. It is the creative application of these theories that is the vehicle for insuring the state's and professionals' accountability.

Procedural due process, for example, has been applied to prevent unjustified civil commitments to mental institutions (*Baxtrom v. Herald*, 1966; *Specht v. Robinson*, 1967; *McNeil v. Director, Patient Institution*, 1972). It is also beginning to be applied to prevent unjustified transfers from one type of an institution to another (*Kesselbrenner v. Anonymous*, 1973). Both applications advance the principle of accountability—that professionals be required to justify the action they propose to take before being allowed to take it.

Substantive due process, for example, has been applied to civil confinement, the nature and duration of which bears no reasonable relation to the purposes for which the person was confined (*Jackson v. Indiana*, 1972; *Wyatt v. Stickney*, 1971). If the purpose of confinement is habilitation or treatment, confinement may not partake of merely custodial care or, worse, punishment. Substantive due process thus advances accountability by requiring the state and its professionals to provide habilitation and treatment.

Finally, equal protection requires that a person's civil confinement be justified by a rational reason or compelling state interest (since confinement affects the fundamental right of personal liberty). This requirement can be satisfied only if treatment and rehabilitation are furnished, since the person is classified as needing confinement on the basis of his need for treatment. In the absence of confinement with treatment, there is no rationality or compelling state interest in the classification or confinement, and the person's equal protection guarantee is violated (*Baxstrom v. Herald*, 1966). In the same manner as substantive due process, equal protection advances a principle of accountability.

Other Judicial Responses

The exact nature of the state's duty to treat those it has confined has not been agreed upon, and it is misleading to suggest that judicial responses to claimed accountability are unanimous. Indeed, some courts have rejected the federal constitutional basis for the duty (*Burham v. Georgia*, 1972), while others have held that the state's duty is only to prevent deterioration or harm (*NYARC v. Rockefeller*, 1973). Some, however, have held that the state's duty is to habilitate (*Wyatt v. Stickney*, 1972; *Welsch v. Likens*, 1974), and those courts have had no problem in devising the standards of that obligation and the methods for overseeing its implementation.

The Standards

The new standards for insuring accountability are those recently created by the mental health and mental retardation professionals themselves. They are the standards of the Joint Council on Accreditation of Hospitals, American Association on Mental Deficiency, Accreditation Council for Facilities for the Mentally Retarded, and Department of Health, Education, and Welfare (*Rockefeller*, 1973; *Wyatt*, 1972; and *Donaldson v. O'Connor*, 1974).

The courts have been reluctant to impose all of the professionally created standards at one time and have instead required compliance with minimum standards (*Wyatt*, 1972; *Rockefeller*, 1973; *Welsch*, 1974; and *Donaldson*, 1974), for the stated reason that the state had insufficient fiscal ability to implement all of the professional standards at one time (*Rockefeller*, 1973; *Wyatt*, 1972).

In what ways are minimum standards applied? They are applied principally by requirements that staff personnel be increased in quantity and upgraded in quality (*Wyatt*, 1972; *Welsch*, 1974), and by prohibitions or restrictions on certain types of treatment (*Welsch*, 1974; *Rockefeller*, 1973; *Wyatt*, 1972). Curiously, the *Welsch* court recently found that the 8th Amendment's prohibition of cruel and unusual punishment had been violated by forms of seclusion, physical restraint, and chemotherapy, as practiced. Previous courts had found violations of 5th and 14th Amendment due process or equal protection but not of the 8th Amendment. Standards have also been applied by the requirement (*Wyatt*, 1972; *Welsch*, 1974) that individualized treatment plans be developed for the residents of state institutions. These requirements have serious implications for educators of the handicapped, as discussed later.

The courts may also have hesitated to require full and immediate compliance with the new standards for other reasons (e.g., a belief that such a requirement would be mocked because of the obvious impossibility of compliance, a sense that their decisions will be acceptable only if they can be complied with). They may also have realized that a substantial restructuring of the institutional care system would be required and that they are not in a good position to monitor the details of the change or to oversee the implementation of massive court ordered change. Nevertheless, by requiring minimum standards of treatment to be furnished, the courts have moved out boldly to assure accountability. Whether their actions will prove to have unwanted or unexpected consequences is a different matter.

In the right to treatment litigation, the courts are assuring accountability by applying principles emanating from a constitution that itself derives from the people as their statement of limitations on the power of government and of the duties of the government to them. Other governmental responses to the needs for accountability having been inadequate (i.e., legislative and executive avenues), the courts have been the only remaining governmental source for requiring accountability. Although they have taken this role by default, in the end this may prove to be the most successful way to insure public and professional accountability. Surely the courts can do no worse than a self serving bureaucracy or an inattentive legislature.

THE RIGHT TO EDUCATION

A nationwide attack is under way against public school practices that deny equal educational opportunities to handicapped persons.

These practices include totally excluding handicapped persons from the public school (*PARC v. Commonwealth*, 1972; *Mills v. D.C.*, 1972; *MARC v. Maryland*, 1974), unjustifiably classifying persons as retarded (*Larry P. v. Riles*, 1972; *LeBanks v. Spears*, 1973; *Diana v. State Board of Education*, 1973; *Guadalupe Org. v. Tempe*, 1972), funding special education as special services at lower levels than regular education services (*Mills*, 1972; *MARC*, 1974), establishing separate criteria for admission of handicapped persons to the school systems (*PARC*, 1972; *Mills*, 1972), limiting the size of special education classes and the capacity of special educational programs (*David P. v. State Dept. of Education*, 1973), and failing to provide education to homebound or institutionalized persons (*MARC*, 1974). Collectively, these practices demonstrate the lack of accountability by the state to the handicapped where accountability means fulfilling a duty to educate both the handicapped and the normal pupil.

Defined by the Courts

The court-ordered remedies address each of the discriminatory practices, thus attempting to assure accountability. Statutes and practices that permit exclusion have been held unconstitutional (*PARC*, 1972; *Mills*, 1972; *MARC*, 1974). Zero reject policies have been established (*PARC*, 1972; *Mills*, 1972; *MARC*, 1974). The implementation of mandatory education for the handicapped legislation has been judicially supervised (*Rainey v. Watkins*, 1973; *Panitch v. Wisconsin*, 1972; *contra*, *Harrison v. Michigan*, 1972). Compensatory educational opportunities for the handicapped have been ordered (*Mills*, 1972; *LeBanks*, 1973). Alternatives to in classroom education have been decreed (*MARC*, 1974). School budgets have been ordered to be increased or amended to provide for education for the handicapped (*Mills*, 1972; *MARC*, 1974). Classification criteria have been ordered to be revised (*LeBanks*, 1972). IQ tests have been temporarily uspended (*Larry P. v. Riles*, 1972). Finally, procedural due process has been imposed on school exclusion and classification decisions (*PARC*, 1972; *Mills*, 1972).

In the right to education litigation, then, accountability means adhering to compulsory school attendance laws, extinguishing exclusionary and unjustifiable classification practices, affirming the principle that all persons are capable of learning and developing (*PARC*, 1972; *Mills*, 1972; *MARC*, 1974). It also means affirming the opportunity of the handicapped to receive appropriate education (*Lau v. Nichols*, 1974; *Guadalupe v. Tempe*, 1972; *Serna v. Portales*, 1972), and affirming the responsibility of the state to deal fairly (through procedural due process) with the handicapped. Additionally, erasing and compensating for long standing deprivations and discrimination, providing a free education, furnishing an education to all handicapped persons, whether they are in their communities or in state institutions (*MARC*, 1974), and redefining the traditional 3 R's concept of education (*MARC*, 1974) all come under the definition of accountability.

The Right to Access

The increasing willingness of courts to permit consumers to have access to educational records concerning them also serves to advance the principle of accountability. Access is granted under the safeguards of procedural due process (*PARC*, 1972; *Mills*, 1972; *LeBanks*, 1973) as well as under federal statutes (P.L. 93-380, Sec. 513) and state statutes (e.g., General Assembly of North Carolina, Ch. 1293, 1973 S.L., 2nd Sess.) for reasons of accountability.

It is appropriate for educators to collect information so that they can better know what a pupil's needs are and can make better judgments about what is in his best interest. However, the pupil also has an interest in the information and is entitled to access to it to insure that it is correct and that decisions based on it are justified by it. Without access he is unable to hold the professional accountable, and professional efforts at denying access may often be correctly seen as resistance to accountability.

In light of such resistance it may be salutory to provide a statutory remedy that grants not merely the right of access, copying, clarification, and expunction but also grounds for the civil action of mandamus (court ordered access) and a misdemeanor level criminal sanction. By the same token, the disclosure of information, without the justification of necessity for treatment or placement decisions, for example, likewise is hard to tolerate on grounds of acceptable professional conduct. A technique for assuring professionalism and accountability for unjustified disclosure has been a lawsuit for invasion of privacy, breach of contract, breach of fiduciary relationship, or defamation. However, since damages are usually difficult to prove in such cases and since the legal elements of any of these actions are sometimes hard to satisfy, a misdemeanor level crime might be a more effective technique.

The Rights of the Individual

Accountability as imposed by the courts in right to education litigation minimally means requiring the state to do what it has undertaken to do—provide an appropriate education to all pupils, including the handicapped. It means more than this, however. The requirements that procedural due process must be satisfied before placement and classification decisions are made tend to focus attention on the individual student's needs, rights and interests. As the requirement that individualized treatment plans be developed for the institutionalized person brings the person, not his environment, to stage center, so too the procedural due process guarantee forces educators to do what they have been reluctant or unable to do before—to individualize education. Moreover, the *PARC* and *Mills* requirements of appropriate educational placement likewise carry the implication of individualized education. It hardly overstates the case to assert that right to education litigation will revolutionize the educational practice of treating students as members of a group or as components in an aggregated consumer group.

The Goal

There is a unifying theme to these judicial efforts. The new theme is that education must be child centered rather than system centered. To assert this is one thing; to insure it is altogether another. School systems are intractable. There is no consensus on what is the proper or sound educational practice to be followed in the case of handicapped persons, and the bureaucratic structure of the schools tends to thwart the child centered changes that the courts require. Moreover, change by the judicial route is particularly incremental, usually taking up one case at a time and, even in the class action litigation, being without power to insure the effective and meaningful implementation of judicial decrees. What educators, legislatures, and consumers have been unable to do over many years—insure equal educational opportunity to the disabled and individualize education—one cannot expect the courts to accomplish overnight. Accountability in the sense of equal educational opportunities for all exceptional children is still a distant goal.

PERSONAL LIABILITY

In the right to treatment and the right to education litigation, courts have attempted to insure accountability by imposing rules of conduct on whole institutions (for the mentally ill and the mentally retarded) and systems (of public education). Their efforts are directed at assuring accountability on a grand scale; they attempt to make the professionals in the institutions or systems accountable by requiring that the institutions and systems themselves become accountable. Yet there is a great difference between court orders directed at institutions and systems, on the one hand, and orders directed at individuals themselves, on the other. The former rarely carry personal liability (except sometimes for contempt of court for noncompliance or dismissal from employment for noncompliance or incompetence), while the latter always do (by personal liability for damages).

Two Examples

Two prominent illustrations serve to emphasize the accountability mileage that can be gained through actions for personal liability. Doctors at a state institution for the mentally ill have been held personally liable to a patient for their bad faith refusal and inexcusable failure to provide him with even the most minimal and rudimentary psychiatric treatment (*Donaldson v. O'Connor*, 1974). In addition, personal damages have been sought against a doctor who performed and state officials who authorized an unnecessary or unjustified involuntary sterilization (*Cox v. Stanton*, 1974). Accountability can often be most expeditiously accomplished through the pocketbook device of personal liability. Indeed, personal liability may effect more system changes than all the minimum standards' requirements of a host of cases. It has the power to personalize the obligation of accountability in a far more direct, understandable, and significant way than the more usual litigation against institutions and systems. It carries power over money.

Other Appropriate Applications

To date, physicians have been the most likely persons against whom the principle of accountability has been applied, through money damages for bad faith, malpractice and deprivation of constitutional rights of liberty and treatment

(*Donaldson v. O'Connor*, 1974). Yet there is no reason to think that the same principle should not be asserted against other professionals. Thus, bad faith action that fails to comply with generally recognized standards of acceptable professional conduct may become actionable in cases involving educators (e.g., for unjustified classification), nonmedical administrators of institutions (e.g., for illegal confinement), and psychologists (e.g., for deprivation of certain basic needs, such as clothing, food, or bedding, as part of behavior shaping token economics).

Surely the standards of competence and accountability that the law applies to the medical profession will be appropriately applied to other professions as well, especially where the medical professionals frequently jointly participate with other professionals in making interdisciplinary judgments concerning such important matters as confinement, treatment, habilitation, and educational placement and classification. These professionals should be held accountable in personal liability for their bad faith failure to give advice or engage in conduct that measures up to and is consistent with the generally recognized standards of acceptable conduct in their respective professions.

It may be the task of the courts to set those standards in advancing the interests of accountability. Surely consumers will not ignore the effect that such standard setting may have in improving the quality of the services they receive.

To the end that the principle of accountability is made applicable to the many affected professions, the state's shield of sovereign immunity and the provision of statutory exculpability or immunity for professionals should be seriously reconsidered. If the shield protects the individual whose bad faith actions fail to measure up to the standards of appropriate professional conduct, it serves only the questionable state purpose of protecting those who should not be protected.That surely is not a legitimate use of the shield. Moreover, it thwarts the consumer interests of accountability. The interests of immunity and exculpability on the one hand, and accountability on the other, can best be served by immunity or exculpability from good faith actions only.

CONCLUSION

The courts predictably will be asked to handle many more cases directed at professional accountability and the subject matter of those cases will become increasingly diverse and complex. For professionals who have acted as though they are above rules of accountability, this prospect must be alarming and disarming. For those who have traditionally recognized that they are subject to the rules of accountability, the prospect may be managerially annoying, but not much worse. For all persons the prospect should be welcomed, for it ultimately will result in improving the social conditions of the handicapped. If their social conditions are improved, one may hope that their capacities likewise will be improved.

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Special Education In The Collective Bargaining Process

☐ Collective bargaining in Michigan, extant since 1965, has touched all phases of education in the public schools.

> The constitutional rights of handicapped children to an education shall not be abridged by conditions of work issues. (Michigan Council for Exceptional Children, 1968, p. 3)

To what extent special education has been considered in the process is relatively unknown. The National Education Association (1969) reported that "student discipline" articles were frequently found in negotiated master contracts. The report also disclosed that Michigan exceeded all other states in such contract provisions.

An analysis of 36 contracts by the Wayne County School Business Officials (1967) reported that 24 contained items concerning "responsibility for emotionally disturbed children." Steele (1969) in a suggested list of priorities for negotiations, included provision of special programs for pupils with special needs, which indicates the possibility of an increase in special education provisions in contracts.

In reviewing occasional contracts we were impressed with the dearth of special education oriented contract items. Though in many cases items dealt indirectly with special education, they possessed potentially serious implications for the field and certainly for children. On the basis of the limited but very important literature and our casual contract reviews, we felt that a comprehensive analysis of what had transpired was vitally needed.

PROCEDURE

Superintendents of all 88 school districts in the Michigan tri-county area (Macomb, Oakland, and Wayne Counties) were requested to submit the master contract currently in force in their districts. A total of 71 contracts (80.7%) were submitted for analysis.

Each contract was examined for provisions directly or indirectly relating to special education. Since no consistency in titling of pertinent articles was found, complete reading of each contract was required.

GENERAL OBSERVATIONS

Pertinent information was found under 26 different article titles. Most employed were such titles as teaching conditions, student discipline, and student-teacher relationships. Some were more specific, mentioning special education or an area of exceptionality. Other data were found in standard contract articles such as class size, salary schedules, and board rights.

Seventy-seven different items were isolated from the available 71 contracts. The frequency of items per contract ranged from none to 12 with a mean of 3.12. When considered collectively the items revealed a spectrum of concern paralleling that of general concern but with the difference of having a marked potential effect upon children.

Of all the items isolated, 22% specifically related to emotionally disturbed or behavior problem children. This was in contrast to 9.1% and 3.9% of the items relating respectively to the mentally and the physically-sensorially handicapped.

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THE CONTRACT ITEMS

In this section contract items are presented which pertained directly to matters of special education. Following these "direct" items are those which were considered "indirect" in import to the field. The complete catalog of items is not presented.

Direct Implications

Acknowledgement of the existence of handicapped children. Acknowledgement items were of two types: those which simply acknowledged the existence of handicapped children and those which also suggested or provided a course of action. Acknowledgement items were often predicated with a statement to the effect that handicapped students (especially the emotionally disturbed) were disruptive to the learning environment and potentially burdensome to the teacher. Samples of the two types of acknowledgement items are the following:

> The board recognizes that teachers may not fairly be expected to assume the ongoing responsibility for the role of warden or custodian for emotionally disturbed, physically or mentally handicapped students or be charged with the responsibility for psychotherapy when the presence of such children in the classroom is unduly detrimental to the education of other children.
>
> Emotionally disturbed pupils and those who present severe disciplinary problems impede the educational programs of the entire class.
>
> . . . exceptional children require special treatment and education by specifically certified teachers. Therefore, the board agrees to continue to seek methods and personnel to expand or create appropriate programs to serve the needs of such children.
>
> The board shall establish classes for emotionally disturbed children which conform to state requirements . . . if qualified personnel are available.

Identification of handicapped students. Few contracts (3%) included identification items, even though their existence was acknowledged. Two items were:

> . . . the state department of public instruction recommendations shall serve as a guide for the board in the identification of emotionally disturbed children.
>
> The board will accelerate testing procedures to identify special physical, mental, and emotional problems.

Referral of students for special services. Items pertaining to referral (found in 43.7% of the contracts) were varied in content and were thus divided into five subcategories. For each subcategory sample items are provided.

Attitude toward referral:

> Teachers are encouraged to refer children.
>
> When it appears that a . . . pupil requires the attention of counselors, social workers, law enforcement personnel, physicians, or other professional persons, teachers shall advise the principal.
>
> Teachers should feel free to confer with the principal about emotionally disturbed children without fear of recrimination or reflection on their teaching abilities.

Prereferral:

> In cases of extreme classroom discipline problems, the teacher may request a conference with the principal and other affected teachers in an attempt to resolve the problems.

Procedures:

> The referral must contain five consecutive anecdotal class observations of the child's behavior; the principal transmits . . . in two days; examination is scheduled within 20 days; interpretation is made to the teacher within 10 days after examination.

Postreferral:

> The principal shall take action deemed appropriate and necessary . . . . necessary and reasonable steps will be taken to provide assistance . . . to the extent . . . required by the person who made the evaluation to support the teacher with respect to such child, or to relieve the teacher of responsibility for such child.
>
> Teachers may appeal cases in which they disagree with the recommendations by specialists.

Postdiagnosis:

> Reduce class size when diagnosed pupils are placed in regular classes.
>
> Equitable and equal distribution of such class.
>
> The teacher has the right to request the transfer of "exceptional" children and, if denied, has the right to confer with appropriate personnel.
>
> Modification of the daily program of a child who is eligible for placement in a special program but not placed.
>
> Provide "special attention" or "supportive help" to classes containing diagnosed emotionally disturbed children.
>
> Pupils who, after consultation with appropriate, qualified personnel, are determined to be incapable of adjusting to the regular classroom will be removed.

Placement and discharge procedures. Only one contract bore an item regarding the placement and discharge of students to and from special education programs.

Integration of special class students within the regular school program. Integration items appeared in 7% of the contracts. Two contracts agreed to continue integration. Two others agreed to "correlate efforts with regular classroom activities so as to meet the needs of special students." A single contract required specific amounts of time and also direction concerning the appropriateness of activities based upon age and capacity. Finally, one contract agreed to "provide a class day for special education students comparable in length to that of regular students."

Special education teachers' rights. A total of 7% of the contracts contained items relating to teachers' rights. Samples of such items are:

> Provisions for reduction in special education staff.
>
> Grievances involving special education are to be directed to the director of special education . . . depending upon their nature.
>
> Special education personnel are not to be used as substitute teachers.
>
> If a summer school program is offered, positions in special education still shall be open to personnel in that department.
>
> Leaves of absence to attend meetings sponsored by the state department of education.

Special education personnel development. Recognition that specialized training and certification are required for teaching handicapped children was made in 10.9% of the contracts. Two made provisions for the development and training of special education staff:

> Reimbursement for courses taken by teachers which qualify them for special assignments for which state or federal reimbursement accrues to the school district.

Involvement of special education personnel in curriculum development. Staff involvement in curriculum development through participation on curriculum or professional study committees was provided in 54.6% of the contracts; however, only 5.6% specified either special education personnel memberships or consideration of special education matters.

Special education salary differentials. Nearly two-thirds (60.5%) of the contracts granted salary differentials to special education teachers. Differentials, where granted, were determined in one of six ways and ranged from $125 to $750. In a few instances, differentials increased with years of experience, with the level (elementary or secondary) taught, or with the type of handicap taught (teachers of the emotionally disturbed tended to gain higher differentials).

Special education class size. Class size was stated in 34.3% of the contracts. Agreement to maintain class size in accordance with "state standards" was most typical.

Procedures for the control of or reduction in class size were found in five contracts, one of which included recourse to the bargaining agency.

Facilities for special education programs. Items requiring adequate facilities for special education programs existed in three contracts.

Scheduling. Scheduling provisions appeared in 28.2% of the contracts. Seven categories were isolated: time of arrival, length of year, length of day, preparation time, relief time, length of lunch period, and travel time.

Summer school special education programs. Three contracts contained an item regarding summer programs.

Supervisory and ancillary personnel. These personnel were provided for in two contracts. One required a sys temwide chairman, and the other agreed to hire an aide where special education pupils remained for lunch.

Indirect Implications

The succeeding portion of this report considers contract items which may have indirect implications for special education.

Discipline and control of pupils. Statements referring to the discipline and control of pupils were found in 61.7% of the contracts. In 14% of the contracts, the following stock statement was used as a preamble to the remainder of the article:

> The teacher's authority and effectiveness in the classroom are undermined when students discover that there is insufficient administrative backing and support of the teacher. As a result, the entire school suffers deterioration in standards, morale, and climate favorable for teaching and learning.

Three contracts contained the above statement but used positive terms. Other samples of discipline and control items were the following:

> The board recognizes its responsibility to give all reasonable support and assistance to teachers with respect to the maintenance of pupil control.

> If a principal is unwilling or unable to support teachers in maintaining school discipline the matter may be referred to the grievance procedures.

Punishment. Items referring to punishment of pupils were found in 39.4% of the contracts. Two contracts directed personnel to use punishment "only as a last resort." Three agreements specified that punishment be administered by a teacher in the presence of another teacher. Another warned against the participation of students in administering punishment. One included the following directive:

> A continuous record of student disciplinary cases and consequent actions will be kept for staff use as a basis for determining or recommending suspension or administration of penalties for misdemeanors.

Suspension from school. School suspension items were contained in 19.7% of the contracts. Three contracts specified behaviors which would result in mandatory suspension. In two contracts provisions were listed for appealing cases in which the principal failed to suspend a child when the teacher felt such action to be necessary. The source to which the appeal was to be made was the superintendent in one contract and the bargaining unit building representative in the other.

Suspension from class. Over one-quarter of the contracts (28%) contained suspension from class items. Of this total, 16 employed the following stock preamble:

> When the grossness of the offense, the persistence of misbehavior, or the disruptive effect of the violation makes the continued presence of the student in the classroom undesirable or intolerable and causes serious disruption . . . a teacher may suspend a pupil from class for one class period.

In 12 contracts either or both of the following statements were made:

> Encouragement, praise, and emphasis upon the child's desirable characteristics are recognized as being most successful methods of working with discipline cases.
>
> Discipline problems are less likely to occur in well taught classes and where a high level of student discipline is maintained.

Suspension from class items also included how and when a report of particulars was to be submitted by the teacher, along with procedures or actions to be taken subsequent to the suspension and for readmittance to class.

SUMMARY AND DISCUSSION

The findings of this study indicate that while relatively little attention is given to special education in the collective bargaining process as seen in individual contracts, the collective implication of 77 items poses major concern for the field.

It is notable that the "handicap" of major concern was that of emotional disturbance (disruptive behavior). This parallels the finding that over 60% of the contracts included discipline and control provisions, which were the most frequently appearing items. As they stand, contract provisions for handicapped children tend to be more concerned with the removal of such children than with the amelioration of their problems. Contract provisions are frequent and clear in expressing intolerance toward "problem" behavior. Furthermore, while several contracts provided for referral, removal, or punishment, only one made provision for reentry into the regular class.

In this day of concern for human rights, it seems imperative that negotiators heed the statement that "constitutional or other rights are not shed at the schoolhouse gate." The aversively oriented items so frequently appearing in contracts require of special education the establishment of rights and appeal procedures for children in distress.

With special education now standing on the threshold of modifying its entire structure in view of self criticism of the worth and efficacy of its traditional programing, the negotiations process may force upon it an obsolete approach that is untenable for itself and, more importantly, for the children and youth under its aegis.

We urge that negotiators give careful consideration to the implications of contract items such as the following:

> Teachers may appeal cases in which they disagree with the recommendations by specialists.
>
> . . . teachers may not fairly be expected to assume the ongoing responsibility for the role of warden or custodian for emotionally disturbed or physically or mentally handicapped students.
>
> No guidance counselor or administrator shall adjust . . . a pupil-teacher problem without prior consultation with the teachers involved.
>
> Children diagnosed or identified as "handicapped" are to be removed from the regular classroom.
>
> The regular classroom teacher is granted the right to request the transfer of "exceptional" children.

> Pupils who, after consultation with appropriate, qualified personnel, are determined to be incapable of adjusting to the regular classroom will be removed.

These items are isolated instances. However, they exist in the contracts of 12 school districts, and items found in one contract often are adopted in others. We further admit that the items were taken out of contexts in which positive principles stating a respect for "the dignity and worth of each individual" were found. But it would seem, then, that each item should reflect the statement of principles of philosophy.

In conclusion, it seems fair to state that, for the most part, collective bargaining has not enhanced the field of special education, although, on the contrary, it seems to have been somewhat beneficial to the special education teacher. As for special education programing, traditional and outdated concepts pervade contractual provisions and/or merely repeat existing state department guidelines.

If, indeed, special education programs are a priority item for future negotiations, it behooves negotiators to make more careful study of the concerns of the field. Special educators must, on the other hand, become aware of and offer guidance to their regular classroom colleagues at the bargaining table who have made and intend to make commitments that may result in an expansion of special education programs that current thinking deems undesirable, inefficacious, and intolerable to the young "exceptional" humans in their charge.

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AFT and NEA Policy Statements on Teacher Rights and Ethics

□ The following statements represent the policies of the American Federation of Teachers and the National Education Association. These statements have been previously published and distributed by these organizations. They are reprinted here with only minor editorial changes.

AMERICAN FEDERATION OF TEACHERS BILL OF RIGHTS

(By Carl J. Megel, Washington Representative, American Federation of Teachers, in collaboration with John Ligtenberg, general counsel)

The teacher is entitled to a life of dignity equal to the high standard of service that is justly demanded of that profession. Therefore, we hold these truths to be self evident:

I: Teachers have the right to think freely and to express themselves openly and without fear. This includes the right to hold views contrary to the majority.

II: They shall be entitled to the free exercise of their religion. No restraint shall be put upon them in the manner, time, or place of their worship.

III: They shall have the right to take part in social, civil, and political affairs. They shall have the right, outside the classroom, to participate in political compaigns and to hold office. They may assemble peaceably and may petition any government agency, including their employers, for a redress of grievances. They shall have the same freedom in all things as other citizens.

IV: The right of teachers to live in places of their own choosing, to be free of restraints in their mode of living and the use of their leisure time shall not be abridged.

V: Teaching is a profession, the right to practice which is not subject to the surrender of other human rights. No one shall be deprived of professional status, or the right to practice it, or the practice thereof in any particular position, without due process of law.

VI: The right of teachers to be secure in their jobs, free from political influence or public clamor, shall be established by law. The right to teach after qualification in the manner prescribed by law, is a property right, based upon the inalienable rights to life, liberty, and the pursuit of happiness.

VII: In all cases affecting the teacher's employment or professional status a full hearing by an impartial tribunal shall be afforded with the right to full judicial review. No teacher shall be deprived of employment or professional status but for specific causes established by law having a clear relation to the competence or qualification to teach, proved by the weight of the evidence. In all such cases the teacher shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation; to be confronted with the accusing witnesses, to subpoena witnesses and papers, and to the assistance of counsel. No teacher shall be called upon to answer any charge affecting his employment or professional status but upon probable cause, supported by oath or affirmation.

VIII: It shall be the duty of the employer to provide culturally adequate salaries, security in illness and adequate retirement income. The teacher has the right to such a salary as will: (a) afford a family standard of living comparable to that enjoyed by other professional people in the community; (b) make possible freely chosen professional study; (c) afford the opportunity for leisure and recreation common to our heritage.

IX: Teachers shall not be required under penalty of reduction of salary to pursue studies beyond those required to obtain professional status. After serving a reasonable probationary period a teacher shall be entitled to permanent tenure terminable only for just cause. They shall be free as in other professions in the use of their own time. They shall not be required to perform extracurricular work against their will or without added compensation.

X: To equip people for modern life requires the most advanced educational methods. Therefore, the teacher is entitled to good classrooms, adequate teaching materials, teachable class size and administrative protection and assistance in maintaining discipline.

XI: These rights are based upon the proposition that the culture of a people can rise only as its teachers improve. A teaching force accorded the highest possible professional dignity is the surest guarantee that blessings of liberty will be preserved. Therefore, the possession of these rights impose the challenge to be worthy of their enjoyment.

XII: Since teachers must be free in order to teach freedom, the right to be members of organizations of their own choosing must be guaranteed. In all matters pertaining to their salaries and working conditions they shall be entitled to bargain collectively through representatives of their own choosing. They are entitled to have the schools administered by superintendents, boards or committees which function in a democratic manner.

NEA BILL OF TEACHER RIGHTS

Preamble

We, the teachers of the United States of America, aware that a free society is dependent upon the education afforded its citizens, affirm the right to freely pursue truth and knowledge.

As an individual, the teacher is entitled to such fundamental rights as dignity, privacy, and respect. As a citizen, the teacher is entitled to such basic constitutional rights as freedom of religion, speech, assembly, association and political action, and equal protection of the law.

In order to develop and preserve respect for the worth and dignity of man, to provide a climate in which actions develop as a consequence of rational thought, and to insure intellectual freedom, we further affirm that teachers must be free to contribute fully to an educational environment which secures the freedom to teach and the freedom to learn.

Believing that certain rights of teachers derived from these fundamental freedoms must be universally recognized and respected, we proclaim this Bill of Teacher Rights.

Article I: Rights as a Professional

As a member of the teaching profession, the individual teacher has the right:

Section 1. To be licensed under professional and ethical standards established, maintained, and enforced by the profession.

Section 2. To maintain and improve professional competence.

Section 3. To exercise professional judgment in presenting, interpreting, and criticizing information and ideas, including controversial issues.

Section 4. To influence effectively the formulation of policies and procedures which affect one's professional services, including curriculum, teaching materials, methods of instruction, and school-community relations.

Section 5. To exercise professional judgment in the use of teaching methods and materials appropriate to the needs, interests, capacities, and the linguistic and cultural background of each student.

Section 6. To safeguard information obtained in the course of professional service.

Section 7. To work in an atmosphere conducive to learning, including the use of reasonable means to preserve the learning environment and to protect the health and safety of students, oneself, and others.

Section 8. To express publicly views on matters affecting education.

Section 9. To attend and address a governing body and be afforded access to its minutes when official action may affect one's professional concerns.

Article II: Rights as an Employee

As an employee, the individual teacher has the right:

Section 1. To seek and be fairly considered for any position commensurate with one's qualifications.

Section 2. To retain employment following entrance into the profession in the absence of a showing of just cause for dismissal or nonrenewal through fair and impartial procedings.

Section 3. To be fully informed, in writing, of rules, regulations, terms, and conditions affecting one's employment.

Section 4. To have conditions of employment in which health, security, and property are adequately protected.

Section 5. To influence effectively the development and application of evaluation procedures.

Section 6. To have access to written evaluations, to have documents placed in one's personnel file to rebut derogatory information and to have removed false or unfair material through a clearly defined process.

Section 7. To be free from arbitrary, capricious, or discriminatory actions affecting the terms and conditions of employment.

Section 8. To be advised promptly in writing of the specific reasons for any actions which might affect one's employment.

Section 9. To be afforded due process through the fair and impartial hearing of grievances, including binding arbitration as a means of resolving disputes.

Section 10. To be free from interference to form, join, or assist employee organizations, to negotiate collectively through representatives of one's own choosing, and to engage in other concerted activities for the purpose of professional negotiations or other mutual aid or protection.

Section 11. To withdraw services collectively when reasonable procedures to resolve impasse have been exhausted.

Article III: Rights in an Organization

As an individual member of an employee organization, the teacher has the right:

Section 1. To acquire membership in employee organizations based upon reasonable standards equally applied.

Section 2. To have equal opportunity to participate freely in the affairs and governance of the organization.

Section 3. To have freedom of expression, both within and outside the organization.

Section 4. To vote for organization officers, either directly or through delegate bodies, in fair elections.

Section 5. To stand for and hold office subject only to fair qualifications uniformly applied.

Section 6. To be fairly represented by the organization in all matters.

Section 7. To be provided periodic reports of the affairs and conduct of business of the organization.

Section 8. To be provided detailed and accurate financial records, audited and reported at least annually.

Section 9. To be free from arbitrary disciplinary action or threat of such action by the organization.

Section 10. To be afforded due process by the organization in a disciplinary action.

CODE OF ETHICS OF THE EDUCATION PROFESSION

(Adopted at the NEA Representative Assembly, July 1975)

Preamble

The educator, believing in the worth and dignity of each human being, recognizes the supreme importance of the pursuit of truth, devotion to excellence, and the nurture of democratic principles. Essential to these goals is the protection of freedom to learn and to teach and the guarantee of equal educational opportunity for all. The educator accepts the responsibility to adhere to the highest ethical standards.

The educator recognizes the magnitude of the responsibility inherent in the teaching process. The desire for the respect and confidence of one's colleagues, of students, of parents and of the members of the community provides the incentive to attain and maintain the highest possible degree of ethical conduct. The Code of Ethics of the Education Profession indicates the aspiration of all educators and provides standards by which to judge conduct.

Principle I: Commitment to the student

The educator strives to help each student realize his or her potential as a worthy and effective member of society. The educator therefore works to stimulate the spirit of inquiry, the acquisition of knowledge and understanding, and the thoughtful formulation of worthy goals.

In fulfillment of the obligation to the student, the educator—

1. Shall not unreasonably restrain the student from independent action in the pursuit of learning.
2. Shall not unreasonably deny the student access to varying points of view.
3. Shall not deliberately suppress or distort subject matter relevant to the student's progress.
4. Shall make reasonable effort to protect the student from conditions harmful to learning or to health and safety.
5. Shall not expose the student to unnecessary embarrassment or disparagement.
6. Shall not on the basis of race, color, creed, sex, national origin, marital status, political or religious beliefs, or family, social or cultural background, unfairly (a) exclude any student from participation in any program; (b) deny benefits to any student; or (c) grant any advantage to any student.
7. Shall not use professional relationships with students for private advantage.
8. Shall not disclose information about students obtained in the course of professional service, unless disclosure serves a compelling professional purpose or is required by law.

Principle II: Commitment to the profession

The education profession is vested by the public with a trust and responsibility requiring the highest ideals of professional service.

In the belief that the quality of the services of the education profession directly influences the nation and its citizens, the educator shall exert every effort to raise professional standards, to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons.

In fulfillment of the obligation to the profession, the educator—

1. Shall not in an application for a professional position deliberately make a false statement or fail to disclose a material fact related to competency and qualifications.
2. Shall not misrepresent his/her professional qualifications.
3. Shall not assist entry into the profession of a person known to be unqualified in respect to character, education, or other relevant attribute.
4. Shall not knowingly make a false statement concerning the qualifications of a candidate for a professional position.
5. Shall not assist a noneducator in the unauthorized practice of teaching.
6. Shall not disclose information about colleagues obtained in the course of professional service unless disclosure serves a compelling professional purpose or is required by law.
7. Shall not knowingly make false or malicious statements about a colleague.
8. Shall not accept any gratuity, gift, or favor that might impair or appear to influence professional decisions or actions.

Provisions for National Enforcement

The following is from the NEA consitution:

> ARTICLE VII, Section 2, a. The Review Board shall have original jurisdiction in the following cases:
>
> 1. Impeachment of an officer who is a member of the Executive Committee;
> 2. Alleged violations of *The Code of Ethics of the Education Profession.*
>
> ARTICLE VII, Section 2, b. The Review Board shall have the following powers subject to the conditions as herein outlined:
>
> 1. To impeach an officer. The officer shall have the right to appeal to the Board of Directors;
> 2. To censure, suspend, or expel a member for violation of *The Code of Ethics of the Education Profession* . . . The member shall have the right to appeal to the Executive Committee on procedural grounds only.
> 3. To vacate censure, lift suspension, or reinstate a member.
>
> ARTICLE VII, Section 4. The Review Board shall establish its rules of procedure with the approval of the Board of Directors. Due process must be guaranteed in all its proceedings.

Adherence to the Code

The NEA constitution also states:

> ARTICLE II, Section 2, b. Members engaged in teaching or in other educational work shall adhere to *The Code of Ethics of the Education Profession.*
>
> ARTICLE IV, Section 6. Executive officers of the Association may be impeached for violation of *The Code of Ethics of the Education Profession,* . . . .
>
> ARTICLE VI, Section 4. Officers of the Association may be impeached for violation of *The Code of Ethics of the Education Profession,* . . . .
>
> ARTICLE VII, Section 5, a. Members of the Review Board may be impeached (by the Executive Committee) for violation of *The Code of Ethics of the Education Profession,* . . . .

According to the NEA bylaws:

> 8-7, d. The affiliate (local) shall adopt a policy that recognizes the preeminence of *The Code of Ethics of the Education Profession.*
>
> 8-11, d. The affiliate (state) shall adopt a policy that recognizes the preeminence of *The Code of Ethics of the Education Profession.*